

United States
Circuit Court of Appeals

For the Ninth Circuit.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Appellant,

vs.

SEARS, ROEBUCK AND CO., a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

APR 2 - 1942

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 462556

SEARS, ROEBUCK AND CO., a corporation,
Plaintiff,

vs.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Defendants.

COMPLAINT

(Negligence)

Plaintiff above-named complains of defendants
as follows:

First Cause of Action

I.

At all times herein mentioned United States Highway 101, also known as State Street, also known as "O" Street, between its intersections with Santa Fe Avenue and Alameda Street in the county of Los Angeles, state of California, was and now is a public highway.

II.

At all times herein mentioned plaintiff was and now is a corporation organized and existing under and by virtue of the laws of the state of New York, duly authorized to transact and now transacting business in the state of California. More than two years prior to the commencement of the within action plaintiff duly and regularly secured from the

Industrial Accident Commission of the State of California a certificate of consent to self insure. At all times material to the within action said certificate was and now is unrevoked, and plaintiff was and now is a self insurer under and by virtue of the provisions of the Labor Code of the State of California.

III.

On or about May 13, 1940, Henderson S. Hutchinson was [2] and for some time prior thereto had been employed by plaintiff as a salesman of merchandise sold by plaintiff. As an incident of the employment aforesaid said employee was required to travel in and about the county of Los Angeles soliciting and obtaining orders for merchandise from plaintiff's customers.

IV.

On said date said employee, while performing services growing out of and incidental to his employment with plaintiff and while acting within the course and scope of his said employment, was driving and operating a motor vehicle in a westerly direction on said United States Highway 101 between its intersections with Santa Fe Avenue and Alameda Street. At said time and place defendant Lillian M. Hoyt was driving and operating a Mercury motor vehicle in an easterly direction along said U. S. Highway 101.

V.

At said time and place Lillian M. Hoyt so negligently operated, controlled and directed said Mer-

cury motor vehicle that the same was caused to and did collide with and strike with great force and violence the motor vehicle driven by said employee.

VI.

As a further, direct and proximate result of the aforesaid negligence of said defendant and as a direct and proximate result of said collision, said employee was thrown with great force and violence against the sides and other parts of the motor vehicle in which he was then driving and thereby suffered serious, severe and fatal injuries. The bodily injuries suffered by said employee as aforesaid, resulted in his death on or about May 16, 1940.

VII.

At the time of his death said employee left surviving him his wife, Harriet E. Hutchinson, and his minor son, David Keith Hutchinson. At said time said wife and said minor son were and for some time prior thereto had been totally dependent on said employee [3] for their maintenance and support.

VIII.

On or about June 15, 1940, said Harriet E. Hutchinson and said David Keith Hutchinson, as the wife and minor son respectively of said employee, filed their application with the Industrial Accident Commission of the State of California against plaintiff for adjustment of claim for compensation by way of a death benefit. On or about July 22, 1940, said

Commission duly rendered and made its award in favor of said Harriet E. Hutchinson and said David Keith Hutchinson and against plaintiff of a death benefit in the total sum of \$6,150.00. Said award has since and prior to the commencement of the within action become final.

IX.

Under and by virtue of said award, plaintiff became, now is, and until said award is fully paid will continue to be, obligated to pay to said Harriet E. Hutchinson and said David Keith Hutchinson the sum of \$6,150.00 as compensation and death benefit for the death of said employee. Plaintiff, therefore, has been and is damaged by reason of said defendant's negligent acts as aforesaid in the sum of \$6,150.00.

Second Cause of Action

I.

Plaintiff refers to paragraphs I to IX inclusive of its first cause of action and by this reference incorporates the same herein as though fully set forth.

II.

On or about May 13, 1940, defendant Ezra S. Hoyt, Jr., was the owner of that certain Mercury motor vehicle hereinabove referred to in paragraph IV of plaintiff's first cause of action.

III.

Plaintiff is informed and believes and therefore alleges that defendant Lillian M. Hoyt was driv-

ing said Mercury motor vehicle [4] at the time and place hereinabove referred to in paragraph IV of plaintiff's first cause of action with the permission and consent of said defendant Ezra S. Hoyt, Jr.

Wherefore, Plaintiff prays judgment against defendants and each of them in the sum of \$6,150.00, for a reasonable attorneys' fee, for plaintiff's costs incurred herein, and for such other and further relief as to the court may seem proper.

LOEB AND LOEB

By HERMAN F. SELVIN

Attorneys for plaintiff.

State of California,
County of Los Angeles—ss.

....., being by me first duly sworn, deposes and says: that he is a member of the firm of Loeb and Loeb, a co-partnership, attorneys of record for Sears, Roebuck and Co., a corporation, plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true. Affiant further states that he makes this verification for and on behalf of said plaintiff corporation for the reason that no officer of said plaintiff corporation resides within the county in which affiant has his office.

HERMAN F. SELVIN

Subscribed and sworn to before me this 26th day of March, 1941.

(Seal) ELLOWENE EVANS

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed 1941 Mar 26 PM 3 27 L. E. Lampton, County Clerk By C. H. Holdredge Deputy [5]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 462556

SEARS, ROEBUCK AND CO., a corporation,
Plaintiff,

vs.

LILLIAN M. HOYT, and EZRA S. HOYT, JR.,
Defendants.

ANSWER

Come now the defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr., and for answer to plaintiff's complaint on file herein, admit, deny and allege as follows:

I.

For answer to paragraphs I, II, III and IV of plaintiff's First Cause of Action the defendants ad-

mit each and every allegation contained in said paragraphs.

II.

Answering paragraph V of plaintiff's First Cause of action defendants deny each and every allegation therein contained and specifically deny that the defendant Lillian M. Hoyt negligently operated, controlled and directed the Mercury motor vehicle which she was driving in such a manner as to cause the same to collide with the motor vehicle driven by plaintiff's employee.

III.

Answering paragraph VI defendants deny each and every allegation therein contained except that defendants admit that plaintiff's employee died on or about May 16th, 1940.

IV.

Answering paragraph VII defendants are informed and believe and therefore admit that plaintiff's employee left surviving a wife, Harriet E. Hutchinson, and a son, David Keith Hutchinson, and specifically deny each and all of the allegations contained in said paragraph except such as are herein expressly admitted. [6]

V.

Answering paragraph VIII defendants admit each of the allegations therein contained.

VI.

Answering paragraph IX defendants admit that by virtue of the award made by the Industrial Accident Commission on or about July 22nd, 1940, plaintiff is obligated to pay to the wife and sone of plaintiff's employee the sum of \$6150.00 as compensation for the death of said employee; further answering paragraph IX defendants deny that plaintiff has been damaged by reason of said award in the sum of \$6150.00, or in any sum whatsoever by reason of any negligence on the part of these answering defendants or either of them.

Answering plaintiff's Second Cause of Action defendants admit, deny and allege as follows:

I.

Defendants refer to paragraphs I to VI inclusive of their answer to plaintiff's First Cause of Action and by this reference incorporate the same herein as their answer to paragraphs I to IX of plaintiff's First Cause of Action and incorporated by reference in plaintiff's Second Cause of Action as though fully set forth herein.

II.

Answering paragraph II and III of plaintiff's Second Cause of Action defendants admit the allegations therein contained.

As a First Separate and Affirmative Defense to plaintiff's First and Second Cause of Action defendants allege:

I.

That the plaintiff's employee, Henderson S. Hutchinson, did not exercise ordinary care, caution or prudence in the premises to avoid said accident, and the resulting injuries, if any, complained of were directly and proximately contributed to and caused by the fault, carelessness and negligence of plaintiff's employee in the premises.

Wherefore defendants pray that plaintiff's complaint be dismissed; for their costs incurred herein; and for such other and further relief as to the court may seem proper.

D. A. BOONE and JAMES T.
SATCHELL and KENNETH
J. MURPHY

By JAMES T. SATCHELL

Attorneys for Defendants.

State of California,
County of Los Angeles—ss.

Ezra S. Hoyt, Jr., being by me first duly sworn, deposes and says: that he is one of the defendants in the above entitled action; that he has read the foregoing answer on behalf of himself and his co-defendant and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

EZRA S. HOYT, JR.

Subscribed and sworn to before me this 8th day of May, 1941.

(Seal) D. A. BOONE

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed LB Superior Court 1941 May 12 PM 4 22 L. E. Lampton, County Clerk By Clara M. Henkel Deputy [8]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 462556

SEARS, ROEBUCK AND CO., a corporation,
Plaintiff and Cross-defendant,

vs.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Defendants and Cross-complainants.

CROSS-COMPLAINT

Come now the defendants and cross-complainants and for several causes of action complain and allege as follows:

First Cause of Action of Lillian M. Hoyt.

I.

At all times herein mentioned United States Highway 101 also known as State Street, also

known as "O" Street, between its intersections with Santa Fe Avenue and Alameda Street in the County of Los Angeles, State of California, was and now is a public highway.

II.

At all times herein mentioned plaintiff and cross-defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, duly authorized to transact and now transacting business in the State of California.

III.

On or about May 13th, 1940, Henderson S. Hutchinson was and for some time prior thereto had been employed by plaintiff and cross-defendant as a salesman of merchandise sold by plaintiff and cross-defendant. As an incident of the employment aforesaid said employee was required to travel in and about the County of Los Angeles soliciting and obtaining orders for merchandise from plaintiff's and cross-defendant's customers. [9]

IV.

On said date said employee, while performing services growing out of and incidental to his employment with plaintiff and cross-defendant and while acting within the course and scope of his said employment, was driving and operating a motor vehicle, to wit: a Packard Sedan, in a westerly direction on said United States Highway 101 between

its intersections with Santa Fe Avenue and Alameda Street. At said time and place defendant and cross-complainant Lillian M. Hoyt was driving and operating a Mercury motor vehicle in an easterly direction along said U. S. Highway 101.

V.

That said time and place plaintiff's and cross-defendant's employee Henderson S. Hutchinson so negligently, carelessly, recklessly and unlawfully drove, operated and controlled said Packard Sedan that the same was caused to and did collide with and strike with great force and violence the Mercury Motor vehicle driven by defendant and cross-complainant Lillian M. Hoyt.

VI.

As a direct and proximate result of the negligence of the employee of plaintiff and cross-defendant, and as a direct and proximate result of said collision, said Lillian M. Hoyt was thrown with great force and violence against the side and other parts of said motor vehicle and the upper part of her body thrown with great force and violence through the door of said vehicle and against the paving and she thereby suffered, through said negligence, serious, severe and permanent injuries, as follows: A deep laceration across the frontal portion of the forehead just above the eyebrows, extending from over the left eye across the forehead to a point just over the right eye, said cut being

approximately four inches in length, the flesh above said laceration being pushed upwards exposing the skull. The blow being of such force and violence [10] to defendant's and cross-complainant's head as to cause the nose to be swollen and misshapen and to assume an unnatural angle for a long period of time, and to cause hemorrhages about her face and eyes and to render her unconscious for a period of time and in a dazed condition for several days thereafter; caused her to suffer a severe and extreme concussion and loss of memory; defendant and cross-complainant has, since being discharged from the hospital, been under the care of a physician and surgeon and has been required to undergo treatment in connection with said laceration, has been caused great physical and mental pain and suffering and is informed and believes that said treatments will continue in the future, the exact extent of which she is at this time unable to state; that defendant and cross-complainant is informed and believes that said laceration and tearing of the flesh across her forehead will result in a prominent unsightly and permanent scar and has caused her, and will in the future cause her, great and extreme embarrassment, humiliation and grievous mental suffering; that defendant and cross-complainant by reason of the negligence of the employee of plaintiff and cross-defendant sustained a shattered and broken tooth by reason thereof it has been necessary for her to undergo several dental opera-

tions for the removal of the broken portions of said tooth buried and embedded in the gum and jawbone, all of which has caused defendant and cross-complainant great pain, shock and suffering and she will be required to undergo further dental treatment in the future, the exact extent and nature of which she is at this time unable to state, said injuries to defendant's and cross-complainant's teeth being permanent; that as a direct and proximate result of the negligence of plaintiff's and cross-defendant's employee and the collision, and in addition to the injuries above-described defendant and cross-complainant suffered various and sundry bruises and abrasions about her limbs and body and great shock and permanent [11] injury to her nervous system and has been caused to endure great physical and mental pain and suffering. That by reason of all of said injuries herein described, directly and proximately caused by the negligence of plaintiff's and cross-defendant's employee defendant and cross-complainant has been damaged in the sum of Twenty-Five Thousand and No/100 (\$25,000.00) Dollars.

First Cause of Action of Ezra S. Hoyt, Jr.:

I.

At all times herein mentioned United States Highway 101, also known as State Street, also known as "O" Street, between its intersections with Santa Fe Avenue and Alameda Street in the Coun-

ty of Los Angeles, State of California, was and now is a public highway.

II.

At all times herein mentioned plaintiff and cross-defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, duly authorized to transact and now transacting business in the State of California.

III.

On or about May 13th, 1940, Henderson S. Hutchinson was and for some time prior thereto had been employed by plaintiff and cross-defendant as a salesman of merchandise sold by plaintiff and cross-defendant. As an incident of the employment aforesaid said employee was required to travel in and about the County of Los Angeles soliciting and obtaining orders for merchandise from plaintiff's and cross-defendant's customers.

IV.

On said date said employee, while performing services growing out of and incidental to his employment with plaintiff and cross-defendant and while acting within the course and scope of his said employment, was driving and operating a motor vehicle, to wit: [12] a Packard Sedan, in a westerly direction on said United States Highway 101 between its intersections with Santa Fe Avenue and Alameda Street. At said time and place defend-

ant and cross-complainant Lillian M. Hoyt was driving and operating a Mercury motor vehicle in an easterly direction along said U. S. Highway 101.

V.

That said time and place plaintiff's and cross-defendant's employee Henderson S. Hutchinson so negligently, carelessly, recklessly and unlawfully drove, operated and controlled said Packard Sedan that the same was caused to and did collide with and strike with great force and violence the Mercury motor vehicle driven by defendant and cross-complainant Lillian M. Hoyt.

VI.

That by reason of and as a direct and proximate result of the negligence of plaintiff's and cross-defendant's employee the Mercury motor vehicle of defendant and cross-complainant was wrecked and damaged and depreciated to such an extent that defendant and cross-complainant was damaged thereby in the sum of Six Hundred Fifty-four and 26/100 (\$654.26) Dollars.

VII.

That at all times herein mentioned and prior to said accident defendants and cross-complainants Lillian M. Hoyt and Ezra S. Hoyt, Jr., were and now are, husband and wife and cohabited and lived together at Rolling Hills, Los Angeles County, California.

VII.

That prior to said accident Lillian M. Hoyt, wife of defendant and cross-complainant Ezra S. Hoyt, Jr., was in good health and fully capable of performing and actually did perform all the household duties of a housewife in the care and management of defendant's and cross-complainant's three minor children; that [13] the said Lillian M. Hoyt has at all times been a pleasant and loving wife to defendant and cross-complainant and prior to said accident defendant and cross-complainant received much comfort and happiness in her society and companionship.

IX.

That by reason of the negligence of plaintiff's and cross-defendant's employee and collision as aforesaid, defendant's and cross-complainant's wife was thrown with great force and violence against the side and other parts of said motor vehicle in which she was riding and the upper part of her body thrown with great force and violence through the door of said vehicle and against the paving and through the negligence of said plaintiff's and cross-defendant's employee received a deep laceration across her forehead, various and sundry bruises and abrasions about her body and limbs and great shock to her nervous system and received a shattered and broken tooth, which said injuries defendant and cross-complainant is informed and believes are permanent and has been caused to endure great

pain and suffering on account of said negligence of said plaintiff's and cross-defendant's employee.

X.

That by reason of said injuries defendant's and cross-complainant's wife Lillian M. Hoyt has been unable to perform the duties which she theretofore had performed for defendant and cross-complainant; that as a result of said injuries said defendant and cross-complainant has been deprived of the services of his said wife, his comfort and happiness in her society and companionship have been greatly impaired and as defendant and cross-complainant is informed and believes and upon such information and belief alleges such fact to be that said deprivation will necessarily continue for a long time to come; that for several months after defendant's and cross-complainant's wife sustained said injuries she was unable to perform her household duties as a housewife and [14] it became necessary for defendant and cross-complainant to employ and he did employ someone to do this work in her place and stead; that by reason of said injuries defendant's and cross-complainant's wife has become highly nervous; that by reason of all of the aforesaid defendant and cross-complainant has been further damaged in the sum of Two Thousand Five Hundred and no/100 (\$2500.00) Dollars.

XI.

That by reason of the aforesaid injuries to defendant's and cross-complainant's wife defendant

and cross-complainant was obliged and did necessarily employ medical and dental aid and attention for his said wife and did necessarily pay and become liable therefor and for nursing and medicine, all in the total sum of Five Hundred Twenty-seven and 35/100 (\$527.35) Dollars; and did necessarily incur expenses in connection with hospital and ambulance service for which defendant and cross-complainant is liable in the sum of Two Hundred Thirty-nine and 79/100 (\$239.79) Dollars; defendant and cross-complainant is informed and believes and upon such information and belief alleges such fact to be that he will incur in addition to the expenses above-mentioned bills for plastic surgery in an attempt to effect a cure and alleviate the suffering of his said wife, in the further sum of approximately One Thousand and no/100 (\$1000.00) Dollars.

XII.

Defendant and cross-complainant is informed and believes and upon such information and belief alleges the fact to be that he will incur in addition to the expense above-mentioned bills for medical and dental expense in the future, the exact nature and extent of which the defendant and cross-complainant is at this time unable to state.

XIII.

That by reason of all of the injuries to defendant's and cross-complainant's wife and his property as above set forth [15] defendant and cross-complainant has been damaged in the aggregate

amount of Four Thousand Nine Hundred Twenty-one and 40/100 (\$4921.40) Dollars.

Wherefore defendants and cross-complainants pray judgment against the plaintiff and cross-defendant as follows:

(1) In favor of Lillian M. Hoyt in the sum of Twenty-five Thousand and no/100 (\$25,000.00) Dollars;

(2) In favor of Ezra S. Hoyt, Jr., in the sum of Four Thousand Nine Hundred Twenty-one and 40/100 (\$4921.40) Dollars;

(3) For costs of suit herein incurred; and

(4) For such other and further relief as to the court may seem proper in the premises.

D. A. BOONE and

JAMES T. SATCHELL and

KENNETH J. MURPHY

By JAMES T. SATCHELL

Attorneys for Defendants and

Cross-complainants

State of California,

County of Los Angeles—ss.

Ezra S. Hoyt, Jr., being by me first duly sworn, deposes and says: that he is one of the defendants and cross-complainants in the above entitled action; that he has read the foregoing cross-complaint on behalf of himself and his co-defendant and cross-complainant and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his

information or belief, and as to those matters that he believes it to be true.

EZRA S. HOYT, JR.

Subscribed and sworn to before me this 10th day of May, 1941.

(Seal)

D. A. BOONE

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed LB Superior Court 1941 May
12 PM 4 22 L. E. Lampton, County Clerk. By
Clara M. Henkel, Deputy. [16]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 462556

SEARS, ROEBUCK AND CO., a corporation,
Plaintiff and Cross-Defendant,

vs.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Defendants and Cross-Complainants.

PETITION FOR REMOVAL OF CAUSE TO
UNITED STATES DISTRICT COURT

To the Superior Court of the State of California,
in and for the County of Los Angeles:

The petition of Sears, Roebuck and Co., plain-
tiff and cross-defendant in the above entitled cause,
respectfully shows to this court:

I.

That this is an action now pending in the above named court in which Sears, Roebuck and Co., a corporation, is plaintiff and cross-defendant.

II.

That said action, originally on its complaint, was an action by Sears, Roebuck and Co., to recover a certain sum, to wit, \$6,150.00 from the defendants and cross-complainants, Lillian M. Hoyt and Ezra S. Hoyt, Jr., which sum was expended by Sears, Roebuck and Co., pursuant to an order of the Industrial Accident Commission of the State of California to the heirs of one Henderson S. Hutchinson, deceased, who was fatally injured while operating an automobile and when, according to the finding of the said Commission, he was acting as an employee of Sears, Roebuck and Co. That the said accident occurred on May 13, 1940.

III.

That subsequently the defendants in said action, Lillian M. Hoyt and Ezra S. Hoyt, filed a cross-complaint against your [18] petitioner seeking damages arising out of the aforesaid accident and alleged to have resulted from negligence on the part of your petitioner. That in said cross-complaint the cross-complainant Lillian M. Hoyt seeks damages in the sum of \$25,000.00 for personal injuries alleged to have been sustained by her and the cross-complainant Ezra S. Hoyt, Jr., seeks damages from

your petitioner in the sum of \$4921.40 for alleged medical expenses incurred on behalf of his wife, the other cross-complainant. That until the said cross-complaint was filed your petitioner was not a defendant in said action. That the said action and the said cross-complaint all arise out of the afore-said automobile accident.

IV.

Your petitioner shows that said action and said cross-complaint involves a controversy wholly between citizens of different states; that cross-complainants, and each of them, are now, were at the time of the commencement of this action, and were at the time of the filing of said cross-complaint citizens and residents of the State of California, and that your petitioner is now, was at the time of the commencement of this action, and at the time of the filing of said cross-complaint, and ever since has been a corporation duly created and organized by and under the laws of the State of New York, and was at all times referred to and is a citizen and a resident of said State of New York and was not, is not, and never has been a corporation chartered and organized under the laws of the State of California and was not, is not, and never has been a citizen or resident of said State of California.

V.

Said action is one of which the District Court of the United States is given original jurisdiction.

VI.

That the time within which your petitioner is required by the laws of this State and the rules of this court to plead to [19] the cross-complaint in the above entitled action has not yet expired. That the said cross-complaint herein was served on your petitioner on May 12, 1941.

VII.

Petitioner presents herewith a bond with good and sufficient surety, conditioned that your petitioner will enter in the District Court of the United States for the Southern District of California, Central Division, within thirty (30) days from the date of the filing of this petition, a certified copy of the record in this suit, and that your petitioner will pay all costs that may be awarded by the said United States District Court in case the said court shall hold that this suit was wrongfully or improperly removed thereto.

VIII.

That prior to the filing of this petition and of said bond for the removal of this case written notice of intention to file the same was given by petitioner to the cross-complainants as required by law, a true copy of which, with proof of service of the same is filed herewith.

Wherefore, your petitioner prays this Honorable Court to proceed no further herewith, except to make an order for the removal of this case to the said District Court of the United States, and to

accept the said petition, bond and surety thereon and cause the record herein to be removed into the said District Court of the United States for the Southern District of California, Central Division, at Los Angeles, California.

And your petitioner will ever pray.

SEARS, ROEBUCK AND CO.,

By LOEB AND LOEB

By HERMAN F. SELVIN

Attorneys for Plaintiff and
Cross-Defendant, Sears,
Roebuck and Co. [20]

State of California,
County of Los Angeles—ss.

Herman F. Selvin, being by me first duly sworn, deposes and says: that he is a member of the firm of Loeb and Loeb, attorneys of record for Sears, Roebuck and Co., a corporation, plaintiff and cross-defendant in the above entitled action; that he has read the foregoing petition for removal of cause to United States District Court and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true. Affiant further states that he makes this verification for the reason that no officer of plaintiff and cross-defendant corporation resides within the county in which affiant has his office.

HERMAN F. SELVIN

Subscribed and sworn to before me this 22nd day of May, 1941.

(Seal) ELLOWENE EVANS

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed 1941 May 22 PM 4 02. L. E.
Lampton, County Clerk. By M. Samuels, Deputy.
[21]

Maryland Casualty Company
Baltimore

In the Superior Court of the State of California
in and for the County of Los Angeles

Case No. 462556

SEARS, ROEBUCK AND CO., a Corporation,
Plaintiff,

vs.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Defendants.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Cross-complainants,

vs.

SEARS, ROEBUCK AND CO., a Corporation,
Cross-defendant.

BOND FOR REMOVAL

Know all men by these presents: That the Maryland Casualty Company, a corporation organized

and existing under the laws of the State of Maryland, having its principal office at Baltimore, Maryland, and duly authorized to transact a general surety business in the State of California, as Surety, is held and firmly bound unto Lillian M. Hoyt and Ezra S. Hoyt, Jr., Defendants and Cross-complainants in the above entitled action, in the penal sum of Five Hundred and no/100 Dollars (\$500.00), for the payment of which sum, well and truly to be made unto Defendants and Cross-complainants, the undersigned, Maryland Casualty Company, binds itself, its successors and assigns, jointly and severally firmly by these presents.

Signed, sealed and dated at Los Angeles, California, [22] this 22nd day of May, A. D. 1941.

Whereas, the Plaintiff and Cross-defendant in the above entitled action has petitioned or is about to petition the above named Superior Court of the State of California in and for the County of Los Angeles for the removal of the above entitled cause or action wherein pending, wherein Sears, Roebuck and Co., a corporation is the plaintiff and cross-defendant, and Lillian M. Hoyt and Ezra S. Hoyt, Jr., is defendants and Cross-complainants, to the United States District Court in and for the Southern District, Central Division of the State of California.

Now, the condition of this obligation is such, that if the plaintiff and cross-defendant shall enter into the United States District Court in and for the

Southern District, Central Division, of the State of California, within thirty (30) days from the date of filing their petition for removal of said action, a certified copy of the record in the above entitled suit or action, and shall pay all costs that may be awarded by said District Court, if said District Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise it shall remain in full force and effect.

(Seal)

MARYLAND CASUALTY
COMPANY

By RICHARD S. JOHNSTON,
Attorney-in-Fact.

State of California,
County of Los Angeles—ss.

On this 22nd day of May, in the year one thousand nine hundred and forty-one before me Frances B. Gray, a Notary Public, in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Richard S. Johnston known to me to be the duly authorized Attorney-in-Fact of [23] Maryland Casualty Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Corporation, and the said Richard S. Johnston acknowledged to me that he subscribed the name of the Maryland Casualty Company as Surety, and his own name as Attorney-in-Fact.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Seal) FRANCES B. GRAY

Notary Public in and for said County and State.

My Commission expires January 6, 1942.

Approved May 29, 1941.

KURTZ KAUFFMAN

Court Commissioner of

Los Angeles County

Bond of

Maryland Casualty Company

Baltimore

Amount \$500.00

Dated May 22, 1941

[Endorsed]: Filed 1941 May 22 PM 4 02. L. E.
Lampton, County Clerk. By M. Samuels, Deputy.

[24]

In the Superior Court of the State of California
in and for the County of Los Angeles

May 29, 1941.

Present Hon. Frank G. Swain, Judge Presiding.

No. 462556

Department No. 35

SEARS, ROEBUCK AND COMPANY, etc.,
Plaintiff,

vs.

LILLIAN M. HOYT, et al,

Defendants.

Petition and bond of plaintiff and cross-defendant, Sears, Roebuck and Company, etc., for removal to United States District Court in and for the Southern District of California, Central Division come on for hearing, Loeb & Loeb by Vernon W. Hunt appearing as attorneys for plaintiff. Petition is granted and bond approved. [25]

No. 462556

State of California,
County of Los Angeles—ss.

I, L. E. Lampton, County Clerk and ex-officio Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents and orders consisting of:

Complaint, Affidavits of Service by Mail, including copy of Letter (2), Answer, Cross-Complaint, Notice of hearing petition for removal, Petition for removal, Bond for removal, and Minute Order granting petition for removal to the District Court of the United States for the Southern District of California (Central Division) in the action of:

Sears, Roebuck and Co., a Corporation vs. Lillian M. Hoyt and Ezra S. Hoyt, Jr., to be full, true and correct copies of all of the original documents on file and/or of record in this office in said action to date.

In witness whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 19th day of June, 1941.

(Seal)

L. E. LAMPTON,

County Clerk and ex-officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By C. G. ALBRECHT,

Deputy.

[Endorsed]: Certified copy of record on removal.
No. 1602-Y Civil. Filed Jun. 19, 1941. [26]

In the District Court of the United States
for the Southern District of California

Central Division

No. 1602-Y Civil

SEARS, ROEBUCK AND CO., a corporation,
Plaintiff and Cross-Defendant,

vs.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Defendants and Cross-complainants.

ANSWER TO CROSS-COMPLAINT

Comes now the cross-defendant, Sears, Roebuck and Co., a corporation, and answering the cross-complaint herein admits, denies, and alleges as follows:

Answering the first cause of action of Lillian M. Hoyt:

I.

Admits the allegations of paragraphs I and II.

II.

Answering paragraph III, cross-defendant admits that Henderson S. Hutchinson was an employee of the cross-defendant at certain times on or about May 13, 1940, but cross-defendant denies generally and specifically each and every other allegation of said paragraph.

III.

Answering paragraph IV, cross-defendant admits that at the time and place referred to the cross-

complainant, Lillian M. [27] Hoyt, operated an automobile and that Henderson S. Hutchinson operated another automobile, but cross-defendant denies generally and specifically each and every other allegation of said paragraph.

IV.

Denies generally and specifically each and every allegation of paragraphs V and VI.

V.

Cross-defendant lacks information or belief sufficient to enable it to answer the allegations concerning cross-complainant's alleged injuries, damages, and losses, and basing its denial upon said lack of information and belief, and upon said ground alone, denies each and all thereof generally and specifically, and on said ground denies that cross-complainant was injured or damaged or sustained any loss as alleged, or at all.

VI.

Denies that cross-defendant was careless or negligent as alleged, or at all, and denies that Henderson S. Hutchinson was careless or negligent as alleged, or at all.

Answering the first cause of action of Ezra S. Hoyt, Jr.:'

I.

Admits the allegations of paragraphs I, II, and VII.

II.

Answering paragraph III, cross-defendant admits that Henderson S. Hutchinson was an employee of the cross-defendant at certain times on or about May 13, 1940, but cross-defendant denies generally and specifically each and every other allegation of said paragraph.

III.

Answering paragraph IV, cross-defendant admits that at the time and place referred to the cross-complainant, Lillian M. Hoyt, operated an automobile and that Henderson S. Hutchinson [28] operated another automobile, but cross-defendant denies generally and specifically each and every other allegation of said paragraph.

IV.

Denies generally and specifically each and every allegation of paragraphs V, VI, and IX.

V.

Cross-defendant lacks information or belief sufficient to enable it to answer the allegations of paragraphs VIII, X, XI, XII, and XIII, and the other allegations of said cause of action concerning cross-complainant's alleged injuries, damages, and losses, and concerning the alleged injuries, damages, and losses of the said cross-complainant's wife, Lillian M. Hoyt, and basing its denial upon said lack of information and belief, and upon said ground alone,

denies each and all thereof generally and specifically, and upon said ground alone denies that said cross-complainant was injured or damaged as alleged, or at all, and denies that cross-complainant's wife was injured or damaged as alleged, or at all.

VI.

Denies that this cross-defendant was careless or negligent as alleged, or at all, and denies that the said Henderson S. Hutchinson was careless or negligent as alleged, or at all.

Special Affirmative Defenses

I.

For a further, separate and affirmative defense to said cross-complaint and to each cause of action thereof, cross-defendant alleges:

That the accident referred to in cross-complainants' cross-complaint, and in each cause of action thereof, was caused and/or contributed to by negligence on the part of the cross-complainant, Lillian M. Hoyt, in that the said cross-complainant failed to exercise ordinary care in the control, management, and [29] operation of the automobile which she was driving. That at said time and place the said cross-complainant, Lillian M. Hoyt, was the wife of the cross-complainant, Ezra S. Hoyt, Jr.

Wherefore, cross-defendant prays that cross-complainants take nothing herein; that it be awarded judgment for its costs of suit herein incurred, and

that it be awarded judgment as prayed for in its complaint on file herein.

PARKER & STANBURY

By RAYMOND G. STANBURY

Attorneys for Plaintiff and
Cross-Defendant, Sears,
Roebuck and Co. [30]

(AFFIDAVIT OF SERVICE BY MAIL—

1013a, C. C. P.)

State of California,
County of Los Angeles—ss.

Alma Dinwiddie, being first duly sworn, says:
That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business/residence address is: 315 West 9th Street, Los Angeles, California; that on the 24th day of June, 1941, affiant served the within Answer to Cross-Complaint on the defendants and cross-complainants in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said defendants and cross-complainants at the office/residence address of said attorney, as follows: (Here quote from envelope name and address of addressee.) "Messrs. D. A. Boone and James T. Satchell and Kenneth J. Murphy, 300

Jergins Trust Building, Long Beach, California''; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

ALMA DINWIDDIE

Subscribed and sworn to before me this 24th day of June, 1941.

(Seal)

MARY O. TERPENNING

Notary Public in and for the County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

Raymond G. Stanbury, being by me first duly sworn, deposes and says: that he is one of the attorneys for the plaintiff and cross-defendant, Sears, Roebuck and Co., a corporation, in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

That the officers of said corporation are absent from the County of Los Angeles where their attorneys, of whom affiant is one, have their offices, and for that reason affiant makes this verification for and on behalf of said plaintiff and cross-defendant herein.

RAYMOND G. STANBURY

Subscribed and sworn to before me this 19th day of June, 1941.

(Seal)

MARY O. TERPENNING

Notary Public in and for the said County and State.

[Endorsed]: Filed Jun. 24, 1941. [31]

[Title of District Court and Cause.]

MINUTE ORDER

This cause coming on to be heard by the Court without a jury,—a jury having been expressly waived by the parties,—upon the issues raised by the Complaint and the Answer thereto, and the Defendants' Cross Complaint and the Plaintiff's Answer thereto, and evidence oral and documentary having been introduced, and the cause having been submitted to the Court for decision, and the Court having considered the evidence and the law and the arguments of counsel, now finds in favor of the Plaintiff and Cross Defendant and orders judgment in its favor in the sum of \$6150.00 and costs, and

that the Defendants and Cross Complainants take nothing by their Cross Complaint.

The Court is of the view that the accident which resulted in the death of the Plaintiff's employee, for which compensation was ordered paid by the Industrial Accident Commission of California, was solely the result of the negligence of Lillian M. Hoyt, and that this negligence was the sole and proximate cause of the injuries and consequent death of the Plaintiff's employee.

Findings and Judgment to be prepared by counsel for the Plaintiff under Local Rule 8.

Dated this 17th day of October, 1941.

[Endorsed]: Filed Oct. 17, 1941. [32]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing in the above court before the Hon. Leon R. Yankwich, Judge Presiding, on October 14, 1941, at the hour of 10:00 A.M., the plaintiff and cross-defendant, Sears, Roebuck and Co., a corporation, being represented by its counsel, Parker & Stanbury, by Raymond G. Stanbury, Esq., the defendants and cross-complainants, Lillian M. Hoyt and Ezra S. Hoyt, Jr., being present and represented by their counsel, Kenneth J. Murphy, Esq. and Daniel A. Boone, Esq., a jury

trial having been waived by all parties, evidence oral and documentary having been introduced, all parties having rested and the cause having been submitted to the Court for decision, the Court having considered the evidence, the law and the arguments of counsel and being fully informed in the premises herewith makes the following Findings of Fact and [33] Conclusions of Law:

FINDINGS OF FACT

I.

The Court finds that it is true that United States Highway No. 101 at the point at which the accident herein referred to occurred was at all times referred to a public highway in the County of Los Angeles, State of California.

II.

The Court finds that it is true that at and prior to the time of said accident and at all times since the plaintiff and cross-defendant, Sears, Roebuck and Co., a corporation, was and now is a corporation organized and existing under and by virtue of the laws of the State of New York and duly authorized to transact and transacting business in the State of California; that it is true that more than two years prior to the commencement of this action the said plaintiff duly and legally secured from the Industrial Accident Commission of the State of California a certificate of consent to self insure; that at all times involved in this action said certificate was and now is unrevoked and plaintiff was

and now is self insured under and by virtue of the provisions of the Labor Code of the State of California.

III.

That the Court finds that it is true that, on May 13, 1940, Henderson S. Hutchinson was and prior thereto had been employed by plaintiff as a salesman of merchandise and that as an incident of his employment he was required to travel in and about the County of Los Angeles; that while performing such services and while acting within the course and scope of his said employment, Henderson S. Hutchinson was driving and operating a motor vehicle in a westerly direction on said United States Highway No. 101 between its intersections with Santa Fe Avenue and Alameda Street; that at said time [34] and place the defendant Lillian M. Hoyt was driving and operating a Mercury motor vehicle in an easterly direction along said United States Highway No. 101.

IV.

The Court finds that it is true that at the said time and place the defendant Lillian M. Hoyt negligently operated, controlled and directed the said Mercury automobile so as proximately to cause the same to swerve to her left-hand side of said highway and to collide with the automobile driven by the said Henderson S. Hutchinson inflicting upon the said Henderson S. Hutchinson personal in-

juries which proximately resulted in his death on or about May 16, 1940.

V.

The Court finds that it is true that at the time of his death the said Henderson S. Hutchinson left surviving him his wife, Harriet E. Hutchinson, and a son, David Keith Hutchinson.

VI.

The Court finds that it is true that on or about June 15, 1940 the said Harriet E. Hutchinson and the said David Keith Hutchinson as the wife and minor son, respectively, of the said employee, Henderson S. Hutchinson, filed their application with the Industrial Accident Commission of the State of California against plaintiff Sears, Roebuck and Co., a corporation, for adjustment of a claim for compensation by way of a death benefit; that on or about July 22, 1940, the said Commission duly rendered and made its award in favor of the said Harriet E. Hutchinson and the said David Keith Hutchinson and against plaintiff of a death benefit in a total sum of \$6,150.00; that said award became final prior to the commencement of this action.

VII.

The Court finds that it is true that by virtue of the said award of the Industrial Accident Commission plaintiff became obligated to pay to the aforesaid wife and son of the said Henderson S. [35] Hutchinson the sum of \$6,150.00 as compensation

for the death of said employee; that it is true that as a result thereof plaintiff was damaged in the sum of \$6,150.00; that it is true that plaintiff sustained said damage as a proximate result of the negligence of the defendant Lillian M. Hoyt.

VIII.

The Court finds that it is true that on May 13, 1940, the defendant Ezra S. Hoyt, Jr., was the owner of that certain Mercury automobile which was being driven by the defendant Lillian M. Hoyt at the time of the aforesaid accident.

IX.

The Court finds that it is true that at the time and place of the accident in question and at the time when the aforesaid fatal injuries were inflicted upon the said Henderson S. Hutchinson as a proximate result of the negligence of the defendant Lillian M. Hoyt the said defendant Lillian M. Hoyt was driving the said Mercury automobile with the permission and consent of the defendant Ezra S. Hoyt, Jr.; that the Court finds that the negligence of the defendant Lillian M. Hoyt is imputed to the defendant Ezra S. Hoyt, Jr., pursuant to the terms of Section 402 of the California Vehicle Code.

X.

The Court finds that as a proximate result of the negligence of the defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr., the plaintiff Sears, Roebuck

and Co. was damaged in the sum of \$6,150.00, although of that amount the defendant Ezra S. Hoyt, Jr., is liable for the sum of \$5,000.00 only.

XI.

The Court finds that it is not true that the plaintiff's employee, Henderson S. Hutchinson, did not exercise ordinary care or caution or prudence at the time and place of said accident or in an effort to avoid said accident and that it is not true that [36] the injuries sustained by the said Henderson S. Hutchinson or his death were directly or proximately caused or contributed to by any fault, carelessness or negligence on the part of the said Henderson S. Hutchinson; that it is not true that the said Henderson S. Hutchinson was careless or negligent in any respect; that the sole proximate cause of the accident and the death of the said Henderson S. Hutchinson was negligence on the part of the defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr.

XII.

On the cross-complaint the Court makes the foregoing findings, and each of them, in addition to those additional findings set forth hereinafter.

XIII.

The Court finds that it is not true that the employee of the plaintiff and cross-defendant, Henderson S. Hutchinson, drove, operated or controlled the automobile which he was driving, which was a

Packard sedan, negligently or carelessly or recklessly or unlawfully and that it is not true that the accident between the said Packard sedan and the automobile driven by the cross-complainant Lillian M. Hoyt was proximately caused or contributed to by any negligence on the part of the said Henderson S. Hutchinson.

XIV.

The Court finds that it is true that as a proximate result of the aforesaid collision between the vehicles referred to the cross-complainant Lillian M. Hoyt sustained certain personal injuries including a laceration upon her face, a concussion of the brain and other injuries, which caused her to be confined for a time to a hospital; but the Court finds that it is not true that the said injuries or losses or damages, or any thereof, were caused or contributed to by any negligence on the part of the cross-defendant or its employee, Henderson S. Hutchinson.

[37]

XV.

The Court finds that it is true that as a proximate result of the aforesaid accident the Mercury automobile driven by the cross-complainant Lillian M. Hoyt and owned by the cross-complainant Ezra S. Hoyt, Jr., was damaged; that it is true that the said Ezra S. Hoyt, Jr., was required to incur various expenses for the treatment of the aforesaid injuries to the cross-complainant Lillian M. Hoyt who was at all times the wife of the cross-complainant Ezra S. Hoyt, Jr.; that it is true that the said

cross-complainant Ezra S. Hoyt, Jr., was required to employ and did employ persons to perform certain of the household duties of his said wife; that it is true that the said Ezra S. Hoyt, Jr., sustained other losses and incurred other expenses in connection with the said accident including the employment of the physicians, hospital, ambulances, x-rays and dentists; that it is true that the said Ezra S. Hoyt, Jr., sustained losses thereby but the Court finds that it is not true that any of the said losses were proximately caused or contributed to by any negligence on the part of the cross-defendant or its employee, Henderson S. Hutchinson.

XVI.

The Court finds that all damage and loss of every kind and nature whatsoever sustained by the cross-complainants, or either of them, were proximately and solely caused by negligence on the part of the cross-complainants, and each of them, and that it is not true that the cross-complainants, or either of them, were damaged at all as a result of any negligence on the part of the cross-defendant or its employee, Henderson S. Hutchinson.

XVII.

The Court finds that it is true that the sole proximate cause of the aforesaid accident, of the death of Henderson S. Hutchinson, of the damage and loss sustained by the plaintiff and cross-defendant and by the cross-complainants, and each of them, was

negligence on the part of the defendants and cross-complainants, [38] and each of them, as herein found; that solely and as a proximate result of the said negligence of the defendants, and each of them, the plaintiff was damaged in the sum of \$6,150.00, of which sum the defendant Ezra S. Hoyt, Jr., is liable for the sum of \$5,000.00.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact the Court concludes as a matter of law that the plaintiff Sears, Roebuck and Co., a corporation, is entitled to have and recover a judgment in the total sum of \$6,150.00 together with costs of suit as follows: Against the defendant Lillian M. Hoyt the sum of \$6,150.00 and costs of suit; against the defendant Ezra S. Hoyt, Jr., the sum of \$5,000.00 and costs of suit; that the cross-complainants Lillian M. Hoyt and Ezra S. Hoyt, Jr., and each of them, are not entitled to recover anything from the defendant Sears, Roebuck and Co., a corporation.

Dated: November 13th, 1941.

LEON R. YANKWICH

Judge

Approved as to form:

KENNETH J. MURPHY & DANIEL
A. BOONE

By

Attorneys for Defendants and Cross-
Complainants. [39]

Received copy of the within Findings of Fact and
Conclusions of Law the 6th day of November, 1941.

KENNETH J. MURPHY

By G. DESSERTY

Attorneys for Defendants &
Cross-Complainants

[Endorsed]: Filed Nov. 13, 1941. [40]

In the District Court of the United States, for the
Southern District of California, Central Di-
vision.

No. 1602-Y Civil

SEARS, ROEBUCK AND CO., a corporation,
Plaintiff and Cross-defendant,

vs.

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Defendants and Cross-complainants.

JUDGMENT

This cause came on for hearing in the above court
before the Hon. Leon R. Yankwich, Judge Presid-
ing, on October 14, 1941, at the hour of 10:00 A.M.,
the plaintiff and cross-defendant, Sears, Roebuck
and Co., a corporation, being represented by its
counsel, Parker & Stanbury, by Raymond G. Stan-
bury, Esq., the defendants and cross-complainants,
Lillian M. Hoyt and Ezra S. Hoyt, Jr., being pres-
ent and represented by their counsel, Kenneth J.

Murphy, Esq., and Daniel A. Boone, Esq., a jury trial having been waived by all parties, evidence oral and documentary having been introduced, all parties having rested and the cause having been submitted to the Court for decision, the Court having considered the evidence, the law and the arguments of counsel and being fully informed in the premises and having made its Findings of Fact and Conclusions of Law: [41]

It is hereby ordered, adjudged, and decreed that the plaintiff, Sears, Roebuck and Co., a corporation, shall have and recover judgment in the total sum of \$6,150.00, together with costs of suit herein incurred, as follows:

Against the defendant Lillian M. Hoyt for the sum of \$6,150.00 and costs of suit, taxed in the sum of \$65.65.

Against the defendant Ezra S. Hoyt, Jr., for the sum of \$5,000.00 and costs of suit, taxed in the sum of \$65.65.

Payment of the sum of \$5,000.00 and costs of suit, by either of said defendants, shall operate as full satisfaction of this judgment as against the defendant Ezra S. Hoyt, Jr., and shall leave only the sum of \$1,150.00 to be paid on this judgment against Lillian M. Hoyt.

It is hereby further ordered, adjudged, and decreed that the cross-complainants, and each of them, have and recover nothing from the cross-defendant, Sears, Roebuck and Co., a corporation.

Dated: November 13th, 1941.

LEON R. YANKWICH

Judge

Approved as to form:

KENNETH J. MURPHY &

DANIEL A. BOONE

By

Attorneys for Defendants and
Cross-Complainants

Received the within Judgment this 6th day of
November, 1941.

KENNETH J. MURPHY

By G. DESSERY

Attorneys for Defendants and
Cross-Complainants. [42]

[Endorsed]: Filed Nov. 13, 1941. Judgment entered Nov. 13, 1941. Docketed Nov. 13, 1941. Book C. O. 7, Page 370. R. S. Zimmerman, Clerk, By Louis J. Somers, Deputy. [43]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To the Defendants and Cross-Complainants, Lillian M. Hoyt and Ezra S. Hoyt, Jr., and to Their Attorneys, D. A. Boone and James T. Satchell and Kenneth J. Murphy:

You, and each of you, will please take notice that the judgment in the above entitled action was en-

tered on the 13th day of November, 1941, in Civil Order Book No. 7, at page 370.

Dated: November 17, 1941.

PARKER & STANBURY

By TAYMOND G. STANBURY

Attorneys for Plaintiff and
Cross-defendant, Sears, Roebuck and Co., a corporation.

Received copy of the within Notice of Entry of Judgment this 18th day of November,

KENNETH J. MURPHY

G. DESSERY

Attorneys for Defendants and
Cross-complainants.

[Endorsed]: Filed Nov. 18, 1941. [44]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the defendants and cross-complainants Lillian M. Hoyt and Ezra S. Hoyt, Jr. hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that certain final judgment entered in the above entitled action on the 13th day of November, 1941.

Dated: December 11th, 1941.

KENNETH J. MURPHY

Attorney for defendants and
cross-complainants.

[Endorsed]: Filed and mailed copy to Attys. for Plf. Dec. 11, 1941. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy. [45]

[Title of District Court and Cause.]

STIPULATION RE DESIGNATION OF THE
RECORD, PROCEEDINGS AND EVIDENCE
IN RECORD ON APPEAL (RULE
75)

It is hereby stipulated by and between Sears, Roebuck and Co. a corporation, Appellee, and Lillian M. Hoyt and Ezra S. Hoyt, Jr., Appellants in the above entitled action, by and through their respective attorneys of record undersigned, that the record on appeal in the above entitled action should consist of all of the pleadings, including the Complaint and Summons of the plaintiff and the Answer of the defendants, the Cross-complaint of the cross-complainants, and the Answer to the Cross-complaint, the Findings of Fact and Conclusions of Law, and the Judgment.

It is further stipulated that the complete Transcript of the stenographic notes of the official short-

hand reporter, Mr. H. A. Dewing shall be included in said record on appeal.

It is further stipulated that an original and a file [49] copy of said Transcript shall be filed herewith.

Dated: December 16th, 1941.

PARKER AND STANBURY

By RAYMOND G. STANBURY

Attorneys for Appellee

KENNETH J. MURPHY

Attorney for Appellants.

[Endorsed]: Filed Dec. 18, 1941. [50]

[Title of District Court and Cause.]

AMENDED DESIGNATION OF THE PAPERS,
RECORDS, MATTERS AND EVIDENCE TO
BE USED ON THE RECORD ON APPEAL
(RULE 75)

Come now the defendants, cross-complainants and appellants, Lillian M. Hoyt and Ezra S. Hoyt, Jr. in the above entitled action, by and through their attorneys of record undersigned, and designate that the record on appeal in the above entitled action should consist of the following, and respectfully requests the Clerk to prepare the following papers:

(a) The complaint of the plaintiffs Sears, Roebuck and Co. a corporation filed in the Superior Court of the State of California, In and For the County of Los Angeles on March 26th, 1941.

(b) The answer of the defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr. to the complaint filed in the Superior Court of the State of California, In and For the County of Los Angeles on May 12th, 1941. [52]

(c) The cross-complaint on behalf of the defendants and cross-complainants Lillian M. Hoyt and Ezra S. Hoyt, Jr. filed in the Superior Court of the State of California, In and For the County of Los Angeles, on May 12th, 1941.

(d) The Petition of the plaintiffs Sears, Roebuck and Co. a corporation for Removal to the Federal Court filed in the Superior Court of the State of California, In and For the County of Los Angeles on May 22nd, 1941.

(e) The Bond on Removal to the Federal Court filed in the Superior Court of the State of California, In and For the County of Los Angeles, on May 22nd, 1941.

(f) The Minute Order filed in the Superior Court of the State of California, In and For the County of Los Angeles, on the removal to the Federal Court filed on May 29th, 1941.

(g) The answer to the cross-complaint of the cross-defendant Sears, Roebuck and Co. filed in the Federal Court on June 24th, 1941.

(h) A complete Reporter's Transcript of the stenographic notes of the Official shorthand reporter, H. A. Dewing.

(i) All exhibits including the map and photographs.

(j) The Minute Order for Judgment filed by

Hon. Leon R. Yankwich, District Judge on October 17th, 1941.

(k) The Findings of Fact and Conclusions of Law filed on November 13th, 1941.

(l) The Judgment signed by Hon. Leon R. Yankwich, District Judge, filed on November 13th, 1941.

(m) The Notice of Entry of Judgment filed on November 17th, 1941.

(n) The Notice of Appeal filed by Appellants Lillian M. Hoyt and Ezra S. Hoyt, Jr. on December 11th, 1941. [53]

(o) The Stipulation in re Designation of the Record, Proceedings and Evidence in Record on Appeal (Rule 75) filed on December 18th, 1941.

(p) The Amended Designation of the Papers, Records, Matters and Evidence to be used on the Record on Appeal (Rule 75) filed on January 26th, 1942.

Dated: January 26th, 1942.

KENNETH J. MURPHY &
DANIEL A. BOONE

By KENNETH J. MURPHY

Attorneys for Appellants.

Received a copy of the within Amended Designation, etc. on this 26th day of January, 1942.

PARKER AND STANBURY

By ALMA DINWIDDIE

Attorneys for Appellee

[Endorsed]: Filed Jan. 26, 1942. R. S. Zimmerman, Clerk. By _____, Deputy. [54]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to inclusive contain full, true and correct copies of: Complaint; Answer; Cross-Complaint; Petition of Plaintiff for Removal; Bond on Removal; Order of Removal; Certificate of Clerk on Removal; Answer of Plaintiff to Cross-Complaint; Order for Judgment; Findings of Fact and Conclusions of Law; Judgment; Notice of Entry of Judgment; Notice of Appeal; Bond on Appeal; Stipulation Designating Record on Appeal; Amended Designation of Record on Appeal; and Order Extending Time to Docket Cause on Appeal, which together with the Exhibits and Reporter's Transcript of Testimony constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$15.35, which amount has been paid to me by the Appellants.

Witness my hand and the seal of the said District Court this 19th day of February, A. D. 1942.

(Seal)

R. S. ZIMMERMAN,

Clerk,

By: EDMUND L. SMITH

Deputy.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS ON TRIAL

Appearances:

Messrs. Parker & Stanbury,

By R. G. Stanbury, Esq.

For plaintiff.

D. A. Boone, Esq.

and

Kenneth J. Murphy, Esq.

For defendants. [1*]

*Page number appearing at top of page of original Reporter's Transcript.

Los Angeles, California,

Tuesday, October 14, 1941. 10 A. M.

(Opening statements.)

W. W. HORST,

a witness called by and on behalf of the plaintiff,
being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Dr. W. W. Horst.

Mr. Murphy: I will be willing to stipulate to Dr. Horst's qualifications; that he is properly qualified as a physician and surgeon.

The Court: Give me a little idea. I don't think the Doctor has appeared before me.

The Witness: No, I never have.

The Court: I like to know these gentlemen that appear before me as experts, because we use them a great deal, and I like to have a general idea of their experience.

Direct Examination

Q. By Mr. Stanbury: Doctor, you are an M. D., are you not? A. Yes.

Q. Licensed to practice as a physician and surgeon in this State? A. Yes, sir. [2]

Q. Of what medical school or schools are you a graduate?

A. Washington University, Medical School.

Q. What year? A. 1913.

Q. Have you been practicing ever since?

A. Yes.

(Testimony of W. W. Horst.)

The Court: That is at——

A. St. Louis.

Q. By Mr. Stanbury: Have you been practicing ever since 1913? A. I have.

Q. Have you had any postgraduate courses, Doctor?

A. I have attended a lot of medical meetings and clinics. I was in France during the last war, with a base hospital there.

Q. At the present time your offices are in the City of Wilmington, are they not? A. Yes.

Q. You are in charge of the Wilmington Emergency Hospital? A. Yes, sir.

Q. As well as having private practice?

A. Yes, sir.

Q. How long have you been in charge of the Wilmington Emergency Hospital?

A. Since 1928. [3]

The Court: Who is associated with you?

A. Dr. Nerab.

The Court: He testified in a maritime case here some time ago.

Q. By Mr. Stanbury: Doctor, I take it that in the course of the last 13 years you have had occasion to see and examine many people at that Emergency Hospital, who have been involved in accidents, have you not? A. Yes, sir.

Q. Do you have with you at this time the record pertaining to Mrs. Lillian Hoyt?

A. I have.

(Testimony of W. W. Horst.)

Q. Will you produce that, please? And did you see Mrs. Hoyt at the Wilmington Emergency Hospital on May 13, 1940? A. Yes, sir.

Q. At what hour did you see her?

A. 4:45 p. m.

Q. She was brought into your hospital in an injured condition, I believe? A. Yes, sir.

Q. Did she make any coherent statement at all while there, on that day? A. No, sir.

Q. Did she utter any recognizable sound?

A. The only thing we could get out of her was "Margie", so we figured that her name was Margie.

[4]

Q. You got the woman's name "Margie" from her; that was the only recognizable sound she made?

A. Yes.

Q. Did you make any observation as to the condition of Mrs. Hoyt's breath at that time?

A. Yes, sir.

Q. What did you observe in that regard?

A. It was an alcoholic breath; it is so stated also on my records.

Q. To what extent did you observe alcohol on her breath?

A. That is hard to say, to what extent. It was there quite definitely.

Q. But you definitely noticed that odor?

A. Yes.

The Court: Was it not discernible so that you

(Testimony of W. W. Horst.)

could say that she had been consuming a certain beverage?

A. I haven't been able to do that.

Q. Is it possible?

A. Some may think so, but I have been fooled so often, I don't try.

Q. In other words a breath is just an alcoholic breath, whether it is beer, wine, whiskey or anything else?

A. That is right. One time I couldn't smell an alcoholic breath on two Japanese, and later one said they had too much sake.

Q. That was rather a foreign breath, wasn't it, Doctor?

Q. By Mr. Stanbury: What hour of the day was it that [5] you made these observations about Mrs. Hoyt, Doctor?

A. Between a quarter of 5 and 5 o'clock in the evening.

Mr. Stanbury: That is all.

Cross Examination

Q. By Mr. Murphy: Doctor, I will look at your card, if I may.

A. Yes. There are X-ray reports from the hospital.

Mr. Murphy: Mr. Stanbury, with your permission, and with the permission of the court, and in order to facilitate the Doctor's time, in addition to my cross examination, may I pursue other matters?

(Testimony of W. W. Horst.)

Mr. Stanbury: Yes.

Q. By Mr. Murphy: Doctor, will you please state what your physical findings were, in addition to this breath, when she came into your hospital?

A. This woman was brought in on a stretcher, and there was a laceration about 4 inches long, going through both brows and the upper eyelids, and across the bridge of the nose. The scalp of the forehead was laid back exposing a large part of the bone of the forehead.

Q. In your professional opinion, Doctor, would you say that she was unconscious?

A. Yes, sir.

Q. For what period of time did she remain unconscious?

A. I saw her over at the hospital about an hour and a [6] half later, and she was still unconscious, but the nurse got the name out of her of Hoyt. I couldn't understand her myself, but the nurse got the name of Hoyt.

Q. After that observation, an hour and a half later, Doctor, do you recall when you saw her again?

A. I saw her the next morning.

Q. What was her condition then relative to consciousness?

A. At that time I thought, although I found later that I was possibly mistaken—but she spoke quite rationally, and was conscious,—I thought she was clear the next morning. Dr. Nerab did not see

(Testimony of W. W. Horst.)

her until a few days later. He dropped in with me. She had never seen him before.

Q. Doctor, what tentative diagnosis did you make, following the accident?

A. She had a severe concussion of the brain; a possible fracture of the skull; severe laceration of the forehead; cut over the nose; and numerous bruises about her body.

Q. Any damage to the teeth?

A. She had one tooth knocked off; broken off.

Q. What did you do in the way of treatment the first few days?

A. After the preliminary treatment of suturing her wound, the treatment chiefly was keeping her quiet in bed, and letting nature do the work.

Q. She was hospitalized? A. Yes. [7]

Q. For what period of time?

A. She went home May 29th. 16 days, I guess. They kept her in the hospital the customary two weeks, on account of the severe concussion of the brain she had.

Q. X-rays were taken? A. Yes.

Q. I believe they were negative for fracture?

A. That's right.

Q. What was your preliminary diagnosis, after an X-ray study?

A. Severe concussion; severe laceration of the forehead; bruises about the chest and the ankle, and especially about the jaw. I thought for awhile that

(Testimony of W. W. Horst.)

she might have a fractured jaw, but the X-rays did not show it.

Q. You ruled out a fractured jaw?

A. Yes.

Q. After she went home did you continue to treat her?

A. No; I saw her once or twice after she went home. She was taken care of after that, by the family physician.

Q. During the time she was under your professional observation and treatment, how many times did you see her?

A. I saw her every day at the hospital; some days oftener. After she went home I didn't keep a record, but I saw her once or twice at home; I didn't keep a record of that.

Q. Did you render a bill for the services rendered by [8] you? A. I did.

Q. Do you recall the amount? A. \$150.

Q. Basing your answer upon your practice and knowledge of fees in the community, would you say that was a reasonable charge for the services which you rendered? A. Yes.

Q. Doctor, were you able, at the time you left the treatment of the case, to arrive at an opinion as to whether or not any of the injuries treated by you would be permanent in character?

A. Yes.

Q. Which ones were?

(Testimony of W. W. Horst.)

A. She will always have this scar, of course. That is the most prominent thing.

Q. Will you describe where that scar is?

A. That scar started right out here, about the edge of the eyebrow, and went across the upper lid, across here, and across the other side, the same way.

The Court: Did it affect or injure the eyes?

A. Very fortunately the eyes were not injured. She had a very black and blue eye on the right side. The eyeball itself was not injured.

Q. Did it cut through the eyelid?

A. Through the upper part of the eyelid; not the lower. [9]

Q. That was the reason that it did not cut the eyeball? A. Yes.

Q. By Mr. Murphy: Doctor, do you feel qualified to state whether or not any residual of the head condition, that is, if any, would be permanent?

A. I would rather not answer that.

Q. I suppose, Doctor, you have not followed through sufficiently on the case to testify to that, is that it? A. That's right.

Mr. Murphy: That is all.

Q. By the Court: Ordinarily concussions—talking in generalities—ordinarily concussions, unless they cover a large area of the brain, do not leave permanent injury?

A. Not ordinarily. Once in a while someone has after trouble.

(Testimony of W. W. Horst.)

The Court: If it is serious there will be some impediment, such as a nerve will be affected—there will be some impediment of speech or hearing, or something of the like?

A. The most usual experience in these people is headache and dizziness.

Q. By Mr. Murphy: How many sutures were required to close this wound?

A. I don't remember. I would say somewhere around 15 or 20.

Q. Can you give us some idea about the depth of the [10] wound?

A. Right down to the skull. You could feel the skull right under your fingers.

Q. What is the usual effect of a blow to the head, so far as memory is concerned of the event?

A. It blots out memory; just as I was going to mention about another case I had,—sometimes immediately before the accident and sometimes for some time preceding the accident, until they become conscious again.

The Court: There is no malingering; it is a genuine situation?

A. Yes; it is quite definite.

Q. By Mr. Murphy: Is it your professional opinion that Mrs. Hoyt suffered pain?

A. Yes.

Q. To what extent, while under your observation?

A. She is a high-strung, nervous individual. She

(Testimony of W. W. Horst.)

was quite nervous all that time, and had to be given a lot of sedatives to quiet her nerves. She had a lot of pain in that jaw, and in her sternum, or breastbone. She had a sore ankle.

Mr. Murphy: That is all.

Redirect Examination

Q. By Mr. Stanbury: You caused Mrs. Hoyt to be X-rayed, did you not? [11] A. Yes.

Q. The X-rays were negative for fracture anywhere, were they not? A. Yes.

Q. The first X-rays of the skull were somewhat ambiguous, and you ordered new ones?

A. Yes.

Q. The new ones showed no evidence of fracture? A. That's right.

Q. So, so far as you know, Mrs. Hoyt did not sustain any fracture of the nose, cheekbone, skull, or any other part of her body?

A. That's right.

Q. When you sent her over to the Seaside Hospital on the day of the accident, despite her unconsciousness, you wrote "Condition fairly good", did you not? A. That's right.

Q. By that you meant that you did not believe that she was suffering at that time from any critical condition?

A. Well, hardly. I meant her condition was good; she had a good pulse, and her general condition was good. I was not expecting her to pass out right away.

(Testimony of W. W. Horst.)

Q. Her pulse was still good at that time?

A. Yes.

Q. She left the hospital, do you know, on what day?

A. On the 28th. I mentioned awhile ago the 29th. It [12] was on the 28th.

Q. Are you the doctor who gave her permission to return to her home? A. Yes.

Q. So she was in the hospital a total of 15 days, including the fraction, wasn't she?

A. That's right.

The Court: I thought the Doctor said 16 days.

A. I made an error of one day, Judge.

Q. By Mr. Stanbury: Do you recall how long she remained in bed at home, if you know?

A. No, I do not. I saw her at home the next day after she left the hospital.

Mr. Stanbury: That is all.

Q. By Mr. Murphy: Doctor, basing your answer upon your professional experience, it is possible to have a very severe concussion result in permanent impairment, without a fracture of the skull, isn't that true? A. Yes.

Mr. Murphy: That is all. [13]

ROBERT C. DANIELSON,

a witness called by and on behalf of the plaintiff,
being first duly sworn, testified as follows:

The Clerk: What is your name?

A. Robert C. Danielson.

Direct Examination

Q. By Mr. Stanbury: Officer, you are a member of the Los Angeles Police Department, are you not?

A. I am.

Q. Stationed at what sub-station?

A. L. A. Traffic Division, San Pedro.

Q. Were you so connected with such station on the afternoon of May 13, 1940?

A. I was in the Traffic Division, only I was an investigator at that time.

Q. In the course of your duties on that afternoon did you go to the scene of an accident involving two vehicles which now may be identified as having been driven by Mrs. Lillian Hoyt, on the one hand, and Mr. Hutchinson, on the other? A. I did.

Q. What time did you get the call to go to that accident? A. 4:30 p. m.

Q. Did you go out there immediately? [14]

A. We did.

Q. When you got there did you find the vehicles? A. We did.

Q. What do you call the highway upon which these cars were located?

A. We call it 101 highway.

Q. Where were they located with reference to

(Testimony of Robert C. Danielson.)

any fixed object alongside the road? I want to fix their position as to the east and west direction of the highway.

A. The only fixed object we made on our report, it was alongside of the Texas Oil Company, approximately a half mile west of the Los Angeles City line.

Q. The road at that point runs which way?

A. East and west.

Q. On this map, on both sides of the road, we see the entries "The Texas Company" and "Wire fence enclosure" as clearly indicated here?

A. Yes.

Q. And that wire fence is the boundary of that Texas property?

A. There is a wire fence there.

Mr. Murphy: I object to the question upon the ground that it calls for the conclusion of the witness.

Mr. Stanbury: That is true. Is that what you refer to as the Texas property?

A. Yes, I would say that was. [15]

Q. Do you recall where these automobiles stood with reference to the wire fence around the Texas property?

A. Not exactly, but they were west of the east end of the fence.

Q. So they were opposite some part of the fence?
A. They were.

(Testimony of Robert C. Danielson.)

Q. Was there a curve immediately west of the place where these automobiles stood?

A. No, there isn't a curve west.

Q. Is there a curve east of where the cars stood?

A. There is a slight curve.

Q. Is the map accurate, according to your observations, as to the direction of the road?

A. It looks very exact to me.

Q. When you were at the scene of the accident, Mr. Danielson, did you take any photographs of the positions of the cars on the highway?

A. I did.

Q. And when you took those photographs, were the cars separated, or still together in some manner?

A. They were still together.

Q. After you had taken these photographs did you place them, and the negatives, in the police records?

A. I did.

Mr. Stanbury: I showed you these?

Mr. Murphy: Yes. [16]

Q. By Mr. Stanbury: I am showing you this. Can you recognize this large picture as an enlargement of one of the photographs you made of these automobiles at the scene of the accident?

A. It looks like the picture that I made, only enlarged.

Q. And the one I hold in my hand, is this the picture you took before the enlargement?

A. That's right. That looks like the picture of the police department, only it's enlarged.

(Testimony of Robert C. Danielson.)

Q. Is this the way these vehicles looked, relative to each other, and relative to the center line of the highway, at the time you arrived?

A. It does.

Mr. Stanbury: I would like to offer this as plaintiff's exhibit next in order.

The Court: That map should be identified, so long as you have used it already. We have a system here, where we have joint exhibits. Do you want it as a joint exhibit?

Mr. Murphy: I would be willing to stipulate to its being so used.

The Court: Very well, the map will be Joint Exhibit No. 1, and the photograph Plaintiff's Exhibit 1.

Q. By Mr. Stanbury: Mr. Danielson, were there any lines painted upon the paved portion of the highway at that time? A. There was. [17]

Q. How many?

A. There was a double line, and two single lane lines.

Q. Where was the double line?

A. The double line was in the center of the paved highway.

Q. That is, down the middle paved portion of the highway, is this double line? A. Yes.

Q. That was the only double line that was painted on the road? A. Yes.

Q. Calling your attention to this enlarged pho-

(Testimony of Robert C. Danielson.)

tograph, which is now Plaintiff's Exhibit No. 1, do you see that double center line? A. I do.

Q. Will you point it out, please? With permission of the court, I would like to put a large C over that, the large C to indicate the center line. Which way is that picture looking, officer?

A. The picture is looking east.

Q. That is, it would be——

A. The picture—this is east; from here to there is east.

Q. Which way is the picture facing?

A. I don't know just exactly what you mean by the picture facing. [18]

Q. Which way was the camera facing?

A. The camera was facing east; in a southeast direction.

The Court: I presume that the car to the right is the Mercury, is that right? A. Yes.

Q. The other car was the car Hutchinson drove?

A. Yes.

Q. What was that?

A. A 1935 Packard sedan.

Mr. Stanbury: May I write these words on that photograph, your Honor—Mercury and Packard?

The Court: That is all right. They are obvious, but you may write them.

Mr. Stanbury: I will put the word "Mercury" up here; and may I write the words on top "Facing east"?

(Testimony of Robert C. Danielson.)

The Court: You are going to show that photograph to others, and it reverses the calendar points, and there is always great confusion in these cases unless you settle the calendar points.

Q. By Mr. Stanbury: Did you notice upon the highway any tire marks which were in any way connected with the point where the Mercury rested on the pavement?

A. Yes, there was 48 feet of distinct skid marks starting from the right lane of traffic up to the point of impact.

The Court: Is Highway 101 at that place four lanes? [19] A. It is, yes.

Q. By Mr. Stanbury: Do you see any part of those tire marks, or any part of either of those tire marks, in the photograph?

A. This line that runs along here.

The Court: Indicating the extreme right corner of the photograph? A. Yes.

Mr. Stanbury: At the bottom, over where it begins, and in the margin of the picture, may I write "Tire marks"?

The Court: Certainly.

Q. By Mr. Stanbury: How many marks did you say there were, 48 feet long, Mr. Danielson? Was there a single mark, or more than one?

A. No, there was a double line, with both lines being double right before the impact.

Q. They started in which lane of traffic, at the furthest end from where the Mercury stood?

(Testimony of Robert C. Danielson.)

A. They started in the right lane of traffic.

Q. Which would be which by compass?

A. It would be the south lane of traffic.

Q. Will you step down to the map here, please, sir? Can you approximate the position on the highway relative to that Texas property, so as to give us a starting point, of where you found these automobiles?

A. I am not able to testify exactly. It was approximately [20] west of this corner. I remember the collision being in front of the wire fence. Just how far, I am unable to testify. I know it was approximately a half a mile from the——

Q. Give it approximately. Will you put an X to indicate approximately the east and west position of this wreck?

A. I would say approximately at this position.

Q. Making a rectangle, Mr. Danielson, and taking your time to get it as exactly as possible, will you draw in the position of the Mercury at the time of your arrival? A. The shape of a car?

Q. Yes, and take your time, if you will, please, to get the angle as accurate as possible.

A. I would say approximately that position.

Mr. Stanbury: I would like to mark that with a 1 with a circle around it, or rather, I will mark it with an M-1, for Mercury-1.

Q. Will you draw in as nearly as you can, the position of the Packard at the time of your arrival? Do you recall which way the Packard was headed

(Testimony of Robert C. Danielson.)

by the compass, at the time of your arrival, Mr. Danielson? A. Can I refer to my diagram?

Q. Yes.

The Court: Certainly, go ahead, Officer—anything that refreshes your recollection.

A. We have so many of these collisions, it is hard to [21] say. In a southwesterly direction.

Mr. Stanbury: May I look at that again?

A. I have got it all turned around.

Q. Which way, by the compass, before you erase that, was the Packard headed?

A. It was headed in a southeast direction.

Q. You have headed it southwest?

A. I have headed it southwest.

Q. Would you just correct that, please? By the way, the lanes are 10 feet wide, are they not?

A. The center lanes are 10 feet wide.

Q. These shoulders are paved?

A. The shoulders, of course, are paved shoulders.

Q. I want you to mark that with a P, for Packard-1. The Packard, I presume, was more than 10 feet long?

A. Yes, I think about 15 feet.

Q. So, in viewing that map, we have to make allowance for the fact that your scale shows the Packard less than 10 feet in length, do we not?

A. Yes.

Q. Will you draw in the 48 feet, skid marks from the Mercury, and you may measure that off with this scale? A. They go in a slight curve.

(Testimony of Robert C. Danielson.)

Q. Take your time, and draw them in, and measure the right distance afterward, if you will, Officer, please.

A. That was approximately the way I have it on my map [22] here.

Q. Mr. Danielson, I notice that you have shown on your diagram the road as 74 feet in width, exactly as it is on the surveyor's map, and you have the tire marks on your diagram starting in that area embraced between the edge of the pavement and the first line south of the center, and I wonder if you distinguished at the time you made the diagram between the paved shoulder and the pavement itself?

A. I realized the paved shoulder was there, but it is used for travel; it is traveled at all times.

Q. That is to say, that is not a shoulder that is only used for parking?

A. I wouldn't say it is a shoulder. It is paved all along here, except a small footage.

Mr. Stanbury: I wish to disclaim this map, so far as it shows that is a paved shoulder, because the photograph of the road will show there is nothing to distinguish.

The Court: The paved shoulder ceases to be a shoulder; it is merely an extension of the road.

A. The road has been widened there.

Mr. Stanbury: The map is in error on that. I have seen the place three times, in preparation for this lawsuit.

(Testimony of Robert C. Danielson.)

The Court: Let the testimony of the officer stand.

Q. By Mr. Stanbury: By the way, were these tracks in a film of dust, or were they apparently rubber marks?

A. Distinct rubber marks. [23]

Q. As if made by a vehicle upon which the brakes had been applied? A. Yes.

Mr. Stanbury: I will mark the west end of the marks just made by the officer off to one side, with the letters TM for tire marks.

Q. Will you take the stand again, please, Mr. Danielson? Did you notice what the damage was to the Mercury?

A. The whole front end was smashed in; the motor was knocked back; in fact, it was folded up pretty bad, the front end; it seemed like it just came together like an accordion.

Q. Did you notice what the damage was to the Packard?

A. The Packard was almost a total wreck. It started from the right front on back to the right rear.

Q. Along the right side?

A. Along the right side.

Q. Did you notice which way, in general, the metal parts on the right side of that Packard were pushed?

A. It was definitely hit from the right front fender, and pushed on back.

(Testimony of Robert C. Danielson.)

Mr. Murphy: I move to strike that it was definitely hit, as a conclusion of the witness. He can state the direction in which it was bent.

The Court: You can state the direction.

A. The vehicle seemed to have been struck from the right front toward the right rear. [24]

Q. By Mr. Stanbury: That is, the metal parts on the right side seemed to be bent backward?

A. Yes, sir.

Q. Was there any damage to the left side of that Packard, that you could see?

A. There wasn't.

Q. Do these photographs, Officer, correctly show the condition of that Packard at the time that you saw it on the road?

A. It looks very much the same as it was on the highway.

Q. Is any part of the front of the Packard damaged, that you can see?

A. No part of the extreme front; just back of the right front fender.

Q. It starts on the side of the right front fender? A. Yes.

Mr. Stanbury: I offer these as plaintiff's next in order, your honor.

The Clerk: Plaintiff's Exhibits 2 and 3.

Q. By Mr. Stanbury: You referred to having taken two pictures at the scene of the accident. Is this the other one, Mr. Danielson, that you took?

(Testimony of Robert C. Danielson.)

A. Yes, sir, that's one of the other ones. I took three photographs.

Q. What was the other one?

A. The other one didn't turn out. I checked with the [25] police department. Only two negatives came out clear.

Q. This was a close-up of the point of impact between the automobiles? A. Yes.

Mr. Stanbury: I offer that as plaintiff's next in order.

The Court: It may be received.

The Clerk: Exhibit No. 4.

Q. By Mr. Stanbury: At the time you arrived there, Officer, were either of the drivers still there?

A. No, they had just taken away both drivers in the ambulance.

Mr. Stanbury: Cross examine.

Cross Examination

Q. By Mr. Murphy: You do not know, Officer, whether either of these cars were moved at all in the process of moving Mr. Hutchinson or Mrs. Hoyt from that wreckage, do you?

A. No, I do not.

Q. In other words, this picture is a photograph taken by you of these cars after the ambulance crew had removed the persons? A. Yes, sir.

Q. How many people were around those cars when you arrived, that is, spectators?

(Testimony of Robert C. Danielson.)

A. I couldn't say. There was several; I imagine there [26] was 30 people or more.

Q. Officer, there is a curve in the highway at approximately the point of this accident, is there?

A. No; I think the curve is east of where the collision occurred.

Q. I realize, Officer, this has been a long time ago, this accident, and merely to refresh your recollection I will ask you: You remember testifying at the coroner's inquest in this matter?

A. Yes, sir.

Mr. Murphy: I am referring, if the court please, and Mr. Stanbury, to the coroner's transcript, page 3, line 19 down to 22. I will ask you to read it.

A. (Reading) "There is a slight curve there; where the accident happened, it is straight, but right before that on the east side of where the collision occurred, there is kind of a wide curve."

Q. "There is kind of a wide curve"—does that refresh your memory?

Mr. Stanbury: I object upon the ground that that is exactly the question asked.

The Court: That is not the question; if counsel wants to draw an inference of inconsistency——

Mr. Murphy: It is not that. I realize that curve is very wide, and inasmuch as the witness was not able to approximate it very closely, I thought if we could refer to [27] the transcript it might help the officer. It may not either.

(Testimony of Robert C. Danielson.)

A. So far as the curve is concerned, there is a curve there. We have had several collisions at that curve.

Q. Can you fix it this way: Referring to where the accident happened, was it before the curve commenced, or on the curve?

A. Where the collision occurred?

Q. Yes.

A. No, it was west of the curve. The road straightens out at that point.

Q. Approximately how far west of the curve?

A. I would say approximately 200 feet. That is not exact.

Q. I appreciate, Officer, that all you can give us is an approximation. I show you what purports to be a photograph looking in an easterly direction, showing the bridge, and ask you if that shows the approximate position of where this accident occurred.

A. It does. It seems like it was in this area, some place in here. Here is the fence.

Q. Yes; there is the wire fence to be seen from the left of the picture, that's right.

A. It was west of the fence. I remember the fence being on the east side—corner of the fence, on the east side of where the collision occurred.

Mr. Murphy: I would like to offer this picture, if the [28] Court please, for the purpose of showing a general view of the territory.

(Testimony of Robert C. Danielson.)

Mr. Stanbury: I don't have any objection if we also have one from the other, to show the perspective.

Mr. Murphy: Yes, I believe we have, Mr. Stanbury.

The Clerk: Defendants' Exhibit A.

Q. By Mr. Murphy: I show you what purports to show a view looking west, Officer. Mr. Stanbury and I have agreed under stipulation that we are not claiming any of these marks, other than this one near the center line.

Mr. Stanbury: For the sake of the record, it is stipulated that none of these marks on this photo, which I will identify for the record, as soon as I get the number, with the exception of the blood mark, which we will mark BM for blood mark, were caused by this accident.

Mr. Murphy: That is so stipulated.

Mr. Stanbury: But may be due to the tow car, or another car we know nothing about.

Mr. Murphy: Quite correct.

Q. Is that view looking west as of the point of accident? A. Yes.

Mr. Murphy: I offer that, subject to the stipulation of Mr. Stanbury.

The Clerk: Defendants' Exhibit B.

Q. By Mr. Murphy: While that is being marked, Officer, I will ask you if you did find a blood mark there. [29]

A. There was a blood mark there, yes.

(Testimony of Robert C. Danielson.)

Q. What was the approximate size of it, the area? A. Well——

Q. You may use the picture, if you wish, to refresh your memory.

A. It don't seem like there was quite that much blood, as what the picture shows, but there was a considerable lot of blood. I wouldn't want to state just how big the spot was.

The Court: Was it a smear?

A. No, it was definite blood.

Q. Was it still liquid, or had it become like a clot, or what?

A. Well, it was fresh. They had just moved Mrs. Hoyt from there, just as I arrived.

Q. By Mr. Murphy: From that point?

A. From that point.

Q. Was there a pool of blood there? Would you express it that way, or was the pavement merely stained?

A. There was quite a bit of blood there.

The Court: Of course, a pool is a large word.

Q. By Mr. Murphy: Officer, I show you one more picture, looking in an easterly direction, and ask you if that is a fair representation of the scene of the accident.

The Court: That has been marked B.

A. It is hard for me to determine. I am not able to see that fence. [30]

Q. By Mr. Murphy: Do you wish to compare Exhibit A with the picture you now have?

(Testimony of Robert C. Danielson.)

A. I would say the collision happened at approximately——

Q. Excuse me. I think you misunderstand; I am not having you fix the point of collision with this picture; merely is it a general view looking east-erly at approximately the point where the accident happened? A. It is a view looking east.

Mr. Murphy: That is all I want for the moment. I offer this at this time as defendants' next in order.

The Clerk: C.

The Court: It may be received.

Q. By Mr. Murphy: I show you, Officer, what purports to be a picture of the Mercury automobile involved in this case, and ask you if that picture is a fair representation of the car in its damaged condition, as you observed it after the accident.

A. I never saw the car after the collision, but that looks similar to what I would expect it to be.

Q. You would say that is a fair representation of it? A. Yes.

Mr. Murphy: I would like to offer this, if the court please, as the picture of the Mercury.

The Court: It may be received.

The Clerk: D.

Q. By Mr. Murphy: I show you another picture, which [31] purports to show a view of the front and left side of the Mercury, and ask you if that is a fair representation of the Mercury after the accident. A. It is, yes, sir.

(Testimony of Robert C. Danielson.)

Mr. Murphy: I would like to offer that as the exhibit next in order.

The Clerk: E.

Q. By Mr. Murphy: This picture, Officer, purports to be a picture showing a view of the front and right side of the Mercury after the accident. Is that a fair representation of the Mercury after the accident? A. It is.

Mr. Murphy: I offer this as defendants' next in order.

The Clerk: F.

Q. By Mr. Murphy: Officer, I show you what purports to be a picture of the blood spot which you previously mentioned, and certain marks—two pictures, one a close-up, and the other showing more territory, and I am going to ask you, Officer, if you are able to identify any of the marks, other than the blood mark, as being made by either car in this collision, and if so, which one.

A. I would say this spot here looks similar to that other spot in the picture.

Q. Are you referring to the blood spot?

A. I am referring to the blood spot.

Q. With regard to this lateral mark going from the [32] blood spot, are you able to identify that at all?

A. These marks here look similar to the brush marks left from the Packard.

Q. When you say "brush marks," what do you

(Testimony of Robert C. Danielson.)

mean, a straight ahead motion, or a side brushing of the wheels? A. Side brushing.

Q. I direct your attention, Officer, to the right rear wheel of the Packard in this picture, Plaintiff's Exhibit 1, and ask you if you found that tire in that condition, that is, flat, as shown on there?

A. I did.

Q. Did you notice at that time as to whether or not there were any brush marks swinging either straight or in an arc, either from the right rear or left rear wheels of the Packard?

A. There was. There was 15 feet of brush marks swinging from a northwest direction to the south.

Q. Were those brush marks made by the front wheels or rear wheels of the Packard?

A. Rear wheels.

Q. I direct your attention now to this picture, which has not yet been offered, which I will hold in my hand, and offer next, and directing your attention to the mark which I will designate——

Mr. Stanbury: You and I won't quarrel about that mark.

Mr. Murphy: ——as A. I will put an A in the center of [33] the mark that I am referring to, Officer, and ask whether or not that is the mark that you referred to as the brush mark, in your notes.

A. That looks similar to the brush mark. Whether that is the mark or not, I wouldn't want to say.

(Testimony of Robert C. Danielson.)

Q. Having in mind, Officer, that you did place this blood mark as being connected with the accident, does that help you fix it?

A. Yes, where the blood mark is—if that is the blood mark of the accident, the brush marks were in this direction from the blood mark. The picture is facing west.

Mr. Murphy: I would like to offer this picture at this time in evidence.

The Court: It may be received.

The Clerk: G.

Mr. Murphy: I believe that is all.

Redirect Examination

Q. By Mr. Stanbury: Mr. Danielson, the brush marks which you described as coming from the Packard were on which side of the center line?

A. They were on the north side.

Q. Were there any marks that you identify as coming from the Packard that were on the south side of the road? A. There was not.

Q. Did you see any signs of tire marks, or any other [34] marks, leading up to the Packard excepting these side brush marks?

A. No, there was no evidence at all of skid marks from the impact; just brush marks.

Q. That is to say, whatever marks may appear upon this variety of photographs, taken after the cars were removed, none of them are to be taken as indicating that the brakes on this Packard had been applied before the impact?

(Testimony of Robert C. Danielson.)

A. That is what I would say.

Q. You saw no such marks?

A. I saw no such marks. We looked for evidence to see which direction the car was coming from.

Q. Did you see any marks on the street, to the south of the center line, except part of that blood mark, and 48 feet of marks leading up to the Mercury? A. South of it?

Q. Yes.

A. When the front of the Mercury and Packard were together the whole street was full of debris and oil marks from the Mercury.

Q. That was where, with reference to the center?

A. That was covering across the center line, where both cars came together.

Q. That was a mass of debris, and accompanying scratches, I take it? A. Yes. [35]

Q. Other than that part of that circle or area of debris over the center line, and part of the blood mark, was there any mark to the south of the center of that highway, except the 48 feet of marks leading up to the Mercury, which you have already described? A. None that we could find.

Mr. Stanbury: I wish, your Honor, to read this sentence from the coroner's transcript, already read, showing that there is a straight away there: "There is a slight curve there; where the accident happened, it is straight, but right before

(Testimony of Robert C. Danielson.)

that on the east side of where the collision occurred, there is kind of a wide curve."

Q. Officer, in Exhibit 1, are you able to find for us the blood mark which we have found in the other pictures? All right, sir, I would like to mark that with a BM, for blood mark, if I may, your Honor.

Mr. Murphy: No objection.

Mr. Stanbury: Or I will mark it "Blood mark."

The Court: I assume that these faintly discernible white lines are the double lines in the highway—these two, is that correct? A. Yes.

Mr. Stanbury: I will just mark that "Blood mark." That blood mark was underneath or opposite the back part of the left front fender and the front part of the front door of the Mercury, is that right? [36]

A. Yes; the door had been opened, where the body was hanging out.

Mr. Stanbury: May I have a few of the other exhibits showing the same thing, Mr. Murphy?

Mr. Murphy: The blood mark?

Mr. Stanbury: Yes.

Q. With reference to Exhibit B, Mr. Danielson, you see the blood mark. That is the same blood mark that you referred to a while ago?

A. Yes.

Q. You saw only one circle of blood?

A. That's right.

(Testimony of Robert C. Danielson.)

Mr. Stanbury: May I mark on Exhibit B also the words "Blood mark," your Honor, to tie it in?

The Court: All right.

Q. By the Court: Officer, in this picture which is Exhibit A, which was evidently taken with the camera facing the turn of the road, so that the double line appears almost straight, the center, you did not indicate there the place at which the collision took place, did you? Where would you indicate it on that photograph?

A. It seemed like to have been right in this position.

Q. That is, the extreme lower end of the photograph? A. Yes.

Q. What was the distance between the place where the automobiles were found, and the beginning of the curve in [37] the road? You said it was on the straight part of the road? A. Yes.

Q. What was the distance, would you say?

A. From my memory only?

Q. Yes.

A. I would say it was about 200 feet; approximately that, it seems like.

Q. By Mr. Stanbury: Which way is the hill? Do you remember, Officer, which way the hill is, east or west, from the scene of the accident?

A. There is a slight grade; as you are driving west from Long Beach, as you come into the curve there is a slight grade.

(Testimony of Robert C. Danielson.)

Q. Is the grade east of the accident or west of the accident?

A. The grade is east of the accident.

Mr. Stanbury: I want to mark the words "Blood mark" also on Exhibit G, under the same mark. That is all, Officer.

Recross Examination

Q. By Mr. Murphy: Would you draw in the brush mark which you have testified to here, made by the Packard? Would you mark that P-1—that mark indicating the brush mark? Now, Officer, referring to the coroner's transcript again, page 7, lines 3 to 6, do you recall the question [38] being put to you by Mr. Boone, and you making this answer:

"Q— From your observation of the cars at the point of impact, was the Mercury on its own side of the road?

"A— It was; there was nothing to establish the Mercury being on the other side of the road." Did you so testify?

Mr. Stanbury: That is objected to as stating the conclusion of the witness, your Honor.

The Court: I will sustain the objection.

Q. By Mr. Stanbury: In looking at certain of these photographs they don't show much of the territory, so on this Exhibit G I am unable to tell which way it is looking. You have marked an A at the area where you say you believe you saw

(Testimony of Robert C. Danielson.)

the brush burns from the Packard. The brush burns from the Packard were which side of the center? A. They were north.

Q. They were north of the center, so if subsequently it should appear that this Packard is looking west, so that the side where you marked the A was actually the south side, the error is in your conclusion that this Packard was looking east rather than that side of the road where the brush burn was?

The Court: He is looking at that, it looks to me, upside down.

Q. By Mr. Stanbury: Which way did you assume that Packard was facing when you put the A on that? [39]

A. I assumed that it was facing east.

Q. Therefore you assumed that the A was on the north side of the road?

A. I assumed it was facing east. I see now that it was facing west.

Q. Did you see any brush burns from the Packard over where the A is?

A. Not from the Packard.

Q. When these pictures were taken all the cars had been towed away? A. Yes.

Mr. Stanbury: I think that point is clarified.

Q. By Mr. Murphy: Irrespective of any picture, you did find 15 feet of brush marks made by the Packard? A. Yes.

(Testimony of Robert C. Danielson.)

The Court: Can you tell from this picture, refreshing your recollection—this photograph which is Plaintiff's Exhibit No. 1, which shows to me about one-third the length of the Mercury across the double line—can you tell from this picture, and from your recollection of the position in which you found the cars, how far across the double line the Mercury was when you got there?

A. It was just like that. I imagine that would be about 3 or 4 feet. The front end of the car, of course, the right side of the Mercury, was right on the double line. It was the left that swung over, through the impact; that is [40] what it looked like. I couldn't figure that out myself.

Q. By Mr. Stanbury: So that the entire front of the Mercury, with the exception of the right-hand side of it, was to the north of the center line?

A. The entire front.

Q. Was the left side of the Mercury further north or further south than the right side of it?

A. The left side was further north.

Q. And the right side of the front of the Mercury was about on the center line?

A. Yes.

Mr. Stanbury: That is all.

(Short recess.)

Mr. Murphy: I would like to call Dr. Dickerson out of order.

The Court: Very well. [41]

DORREL G. DICKERSON

a witness called by and on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Your name, please?

A. Dorrel G. Dickerson.

Direct Examination

Q. By Mr. Murphy: Doctor, you are a physician and surgeon?

A. Doctor of medicine.

Q. From what school were you graduated?

A. George Washington University, 1917.

Q. You have practiced your profession since that time? A. I have.

Q. Do you have a specialty? A. Yes, sir.

Q. What is it, sir?

A. Diagnosis and treatment of nervous disorders, injuries to the brain, and nervous diseases.

Q. Will you state to the court your experience in that line, and your qualifications in general, Doctor, in that specialty?

A. I had postgraduate work in the Neurological Institute, New York, in 1917; I served two years in the United States Army, Department of Nervous and Mental Diseases, in various hospitals. With the Walter Reed, four [42] years, with the United States Public Health Service, in the same capacity, diagnosis and treatment of brain disorders. Private practice in the City of Seattle, in 1925; specialized in neurology and surgery of the brain. At that time I was a consultant for the Ma-

(Testimony of Darrel G. Dickerson.)

rine Hospital, Public Health Service, Veterans' Administration, Police Department, and other hospitals. I came here in 1933, and have practiced my specialty since. I was licensed in California in 1929; and at the present time I am connected with the California Hospital, on the senior staff, and the Presbyterian Hollywood; St. Luke's, Pasadena. My office is at 1401 South Hope Street. I belong to the Medical Society of the State of California, L. A. County, American College of Surgeons, American Board of Neurology.

Q. Did you perform any service for the United States Unemployment Service? A. Yes.

Q. Doctor, I believe you had occasion to examine Mrs. Hoyt? A. I did, sir.

Q. When was that examination made?

A. It was made in May, 1941, at my office in Los Angeles.

Q. Who was present?

A. Mr. Hoyt, and the lady, and my nurse.

Q. What did your examination consist of?

A. History of the case; recording her complaints at that [43] time; a history of what happened, so far as she could tell me, and then a general physical examination.

Q. Doctor, in the interest of saving time, will you please tell the court what you did, your physical findings, your diagnosis and impressions of the patient?

(Testimony of Darrel G. Dickerson.)

A. Do you mean to give the positive things I observed, rather than all the detailed examination?

Q. Wherever it is important you may do that, but what we want in the main are your positive physical findings and your impression based upon the entire case.

A. The physical examination consisted of an examination of the head and cranial orifices, the heart, lungs, taking the blood pressure and pulse, and a general appraisal of her physical condition. I observed at that time a scar in the forehead running from above and incorporating the upper eyelid from right to left, across the bridge of the nose.

The neurological examination consisted of examining the pupils of the eyes, the movements interiorly of the eye, with an ophthalmoscope; an examination of the fifth cranial nerve, the trigeminal nerve, involved in this scar. The upper part of the forehead, into the scalp, both sides of the tissues, were extremely hypersensitive to the touch of cotton and the prick of a pin. It was my opinion that this was due to the injury to the ends of the nerve, as it came out of the little notches above the eye, called the supra-orbital nerve. Naturally, both sides were extremely [44] tender to touch and pressure; the sense of smell was normal; there was no impairment in the opening and closing of the eyes by reason of the scars. All of the reflexes were

(Testimony of Darrel G. Dickerson.)

hyperactive, but equal. There were no abnormal reflexes.

The Court: What was hyperactive or sensitive?

A. Hyperactivity or sensitiveness of the nervous system. There was no involvement of the power of the legs; the Romberg test was negative; there were tremors of the hands and eyes; but aside from that the examination was negative.

The Court: Was there any limitation of motion in any part of the body?

A. No, your Honor. The history was the important part of the examination. There was a history of injury with loss of memory preceding the accident and for some time thereafter, with no recollection on her part of what had happened at that time. When I was examining her, questioning her, she was on the verge of tears, suppressing tears at all times, so I did not press her for the details of the accident.

Q. Where did you say you examined her, at the hospital?

A. At my office, 1401 South Hope.

Q. She had been your patient?

A. She was no patient of mine. I merely examined her at the request of this gentleman, Mr. Murphy.

Q. By Mr. Murphy: Doctor, what is your impression as to any end results of this injury, if any?

(Testimony of Darrel G. Dickerson.)

A. I believe in time she will completely recover.

Q. Can you give the court an idea of that time?

A. In reference to this scar on the forehead, it may be, at the outside, three years before the peculiar sensation and the hypersensitive condition in the forehead disappears. I base that on the fact that these nerves require that long for complete rehabilitation, when we pull them out in operations.

Q. By the Court: She will not require any further operation to remove the skin blemish?

A. It is my opinion that she will not; that is only my opinion.

Q. You call that plastic surgery?

A. Plastic surgery, yes. The nervous symptoms may require anywhere from several months to a year or two. I don't think her memory will ever come back during that time; it is probably a good thing it doesn't. That is what we call amnesia.

Q. That is, for a few days after the accident?

A. Yes.

The Court: Otherwise her memory has not been affected? A. Not in my opinion.

Q. You have various tests which you can give?

A. From her attention to my questions and her reaction, and general appearance, I find no evidence of it.

Q. Don't you have a number of questions which you give? [46]

(Testimony of Darrel G. Dickerson.)

A. That is in testing for mental deficiency, psychology.

Q. In trauma you would not do that?

A. No.

Cross Examination

Q. By Mr. Stanbury: What was the date of the examination? A. May, 1941.

Q. Of this year? A. Yes.

Q. She told you about the accident a year before? A. Yes.

Q. You just saw her the one time?

A. Only once.

Mr. Murphy: What did you say about the scar, whether it would or would not be permanent?

A. The scar will be permanent.

Mr. Murphy: That is all.

Q. By Mr. Stanbury: What color was it when you saw it? A. Pale.

Q. The redness had gone out of it?

A. It had practically disappeared.

The Court: That takes time to blanch?

A. To blanch; the shrinking of the scar.

Q. You can't apply massage?

A. Yes, but in a disfiguring scar, after all, nature [47] ultimately——

Q. Nature ultimately has to do it?

A. But the doctor takes credit for it. If it wasn't for nature we would all have to quit.

(Recess until 2 o'clock p. m. of the same day.) [48]

Afternoon Session

2:00 o'Clock

Mr. Stanbury: I wish to read into the record the testimony of the witness Lenton W. Finton, as given at the coroner's inquest following the accident in question, read by stipulation, the witness being absent on a destroyer at sea at the present time, a seaman in the United States Navy.

"LENTON W. FINTON

being duly sworn, testified as follows:

By the Coroner:

Q. State your name, please.

A. Lenton W. Finton.

Q. Occupation?

A. Storekeeper, Naval Air Station, San Pedro.

Q. State what you saw in reference to the accident, please.

A. Well, at that particular time we were going toward Long Beach, and I noticed this Mercury ahead of us between one hundred and one hundred and fifty feet, somewhere around there, and what particularly drew my attention to it, I had no more than seen the back of it, and it swerved traveling along the first lane, right along the white line, and suddenly swerved to the center lane, and my eye followed the Mercury [49] across there, and I spotted the Packard just as she hit him, and

(Testimony of Lenton W. Finton.)

as near as I could tell, it all hit approximately where they sat.

Q. Did you notice what caused the Mercury to make that sudden swerve?

A. No, sir, I didn't.

Q. When you first saw the Mercury, was it in the lane to your—the most southerly lane of traffic, was it then to your right?

A. When I first saw the Mercury, it was almost dead ahead of us.

Q. Where were you at the time?

A. We were on the outside lane.

Q. What do you mean by 'outside lane'?

A. The lane next to the shoulder.

Q. On the south side?

A. On the south side.

Q. And did it suddenly swerve over to the center of the street?

A. Yes, sir.

Q. Did you see any motor vehicle or obstruction or anything ahead that would cause the driver of the Mercury to make a sudden swerve over to the center of the street?

A. No, sir, I didn't.

Q. In what manner did the two motor vehicles collide?

A. Well, it appeared that the right front end of the [50] Packard, and when they were stopped they were setting on the double white line, the Mercury was setting in catercorner, and the Packard was setting more broadside

(Testimony of Lenton W. Finton.)

to the road (indicating), and the woman when it threw her from the car, it mangled her feet up in the clutch and the brake, and her head was approximately on the double white line, hanging head down, and those cars, neither one did very much swerving, they bounced up and down, and there was a little dust blew and that is about all.

Q. It was the right side of the Mercury that struck the right side of the Packard, is that correct? A. That is correct.

Q. Then which car was on the wrong side of the highway, that is on the wrong side of the center line?

A. The Packard; when they got stopped, the Mercury was setting on that white line, or practically over it, but as near as I could tell from watching, she did not go across that double white line.

Q. Did you see the Packard before the impact?

A. No, sir, the first I seen it was when she hit him.

The Coroner: Any questions?

Q. By a Juror: What speed would you say the Mercury was going?

A. Between forty and forty-five.

Q. By Mr. Danielson: Did you ever see the Packard on the other side of the double line? [51]

(Testimony of Lenton W. Finton.)

A. That is hard to tell, she hit him so quick, I would say that he wasn't but I know I saw her car before I saw his, and she did not go across the double white line.

Q. It is just an opinion that he went the other side of the white line?

A. It is mainly an opinion, yes.

Q. By a Juror: Did you see any skid marks from the Packard? A. No.

Q. By Mr. Boone: At the instant you saw the Packard could you tell what direction the Packard was headed at that time?

A. It occurs to me he was headed off in this direction (indicating).

Q. That is the impression at the time that the Packard was headed across the highway to the southwest?

A. He was like this (indicating), at the moment I saw that Packard, his front end was hitting her front end like that (indicating).

Q. You are indicating that the Packard—how would that be to the highway, would it be at an angle?

A. It was about like that (indicating).

Q. And at the time of the impact, the Mercury was definitely south of the center white line? A. Yes, sir.

Q. By Mr. Hunt: You didn't see the Packard until the moment of the impact? [52]

A. No, sir, I did not.

(Testimony of Lenton W. Finton.)

Q. And don't know what direction it was headed prior to that? A. No, sir.

Q. And you followed the Mercury out there?

A. No, sir, I stayed on the outside lane.

Q. You didn't run into any parked car on the highway, did you?

A. No, sir, we did not.

Q. And didn't find any parked car there?

A. No, sir.

Q. There was no obstruction on the highway at all?

A. I seen no parked cars.

Q. You were traveling on your side of the highway? A. Yes, sir.

Q. And didn't run into any?

A. No, sir.

Q. Where did you bring your car to a stop?

A. Approximately right across from the wreck.

Q. By a Juror: Were you driving?

A. No, sir, Mr. Hoffman was driving.

Q. What speed were you traveling?

A. Right around forty, maybe a little over or a little less.

Q. And there was no noise of any brakes or tires burning?

A. No, sir, none that I noticed or heard.

[53]

Q. By Mr. Boone: Who was driving your car?

A. Mr. Hoffman was driving it.

(Testimony of Lenton W. Finton.)

Q. And where were you sitting with reference to the car, with reference to Mr. Hoffman?

A. I was sitting in the right front seat; I was sitting kind of sideways talking to Mr. Hoffman is the reason I could follow the Mercury with my eyes as well as I did.

Q. You say you did not see any car ahead of the Mercury?

A. No, sir, I did not.

Q. Do I understand you to say there was no car there, or you didn't notice?

A. No, sir, I didn't say there wasn't any, I said I didn't notice any.

Q. You don't know whether there was or wasn't? A. No, sir.

Q. Did you see any car close to the Packard?

A. No, sir.

Q. At the time the two cars came together?

A. No, sir.

Q. Did you see any cars parked over on the north side of the highway opposite the point where they came together as you got out of the car?

A. No, sir. At the time I got out of the car, I was looking across at the wreck.

Q. In other words, you knew somebody was hurt, and you were out there and wasn't paying any attention to any [54] physical facts around the accident?

A. Yes, sir, I seen her head hanging out of the car.

The Coroner: Any other questions? (No response). That is all."

Mr. Stanbury: I wish to read the testimony of Francis H. Hoffman, taken at the coroner's inquest, also read by stipulation.

"FRANCIS H. HOFFMAN,

being first duly sworn, testified as follows:

By the Coroner:

Q. State your name, please.

A. Francis H. Hoffman.

Q. Your occupation?

A. Storekeeper in the Navy.

Q. Where are you attached, attached to a vessel?

A. Naval Air Station, San Pedro.

Q. Where were you at the time the accident occurred, please?

A. We were on our way to Long Beach, and I would say we were about one hundred to one hundred and fifty feet behind the Mercury.

Q. State what you saw in reference to the accident, please.

A. I didn't actually see the impact, I noticed the Mercury going ahead of us, and what drew my attention to the [55] accident was the crash, and I seen they were bouncing around in the highway.

Q. Could you tell where the impact occurred in reference to the center line of the highway?

A. I would say it was just about right where they were at, right on the center line.

(Testimony of Francis H. Hoffman.)

Q. Well, did you see the Mercury before the impact?

A. I noticed it on the highway, just a few seconds before it hit.

Q. Where was it in reference to the center line, was it out near the center?

A. It was out ahead of us; we were on the outboard lane of traffic, and the left front wheels were on the middle white line, not the center of the highway but the other white line.

Q. Had you noticed the Mercury swerve in either direction prior to the impact?

A. No, I hadn't.

Q. Did you form any opinion as to the speed of the Mercury?

A. We were doing about forty, and it was doing at least that, what we were.

The Coroner: Any other questions?

Q. By Mr. Coleman: Was she driving away from you, or approximately the same speed?

A. Well, it all happened so quick, I wouldn't know [56] whether it was the same speed or what.

Q. By a Juror: Did she turn out to pass you? A. No, she was ahead of us.

Q. By Mr. Boone: How far had you followed her?

A. I don't know how far we had followed her, the first thing I noticed was the auto and then the noise of the crash.

(Testimony of Francis H. Hoffman.)

Q. Where did you turn on State Street?

A. The first stop street back there, I think it is Alameda.

Q. Right there by the Texaco plant?

A. Yes.

Q. And the Mercury was just ahead of you when you turned in there?

A. I didn't notice before that.

Q. Not until after you turned on 101, is that correct? A. Yes.

Q. How many cars did you see on the highway at the time?

A. There wasn't very many cars.

Q. Did you notice a car ahead of the Mercury? A. No, I didn't.

Q. When you say you didn't, would you say there wasn't one there, or didn't notice one there?

A. There was a Ford afterwards standing over from the wreck there.

Q. On which side?

A. Right on the side where we were, I didn't notice [57] whether it was there before the wreck or after.

Q. Did you notice a car parked on the north side of the road immediately following the wreck? A. No, sir, I didn't.

Q. Did you see a car ahead of the Packard at any time? A. No, I didn't.

Q. You were not paying any attention to what the physical situation was at that time?

(Testimony of Francis H. Hoffman.)

A. Well, I was watching my driving, and didn't notice the car.

Q. By Mr. Hunt: You didn't see the Packard before the accident? A. No, sir.

Q. The only car you saw at all was the Mercury?

A. I happened to notice it, and the next I seen of it was the crash.

Q. The Mercury was the only car that you noticed, wasn't it?

A. At the time, yes.

Q. By Mr. Chappel: What lane were you traveling in? A. The outboard lane.

Q. And the Mercury also?

A. Yes, sir.

Q. By Mr. Hunt: By 'outboard', do you mean the first lane on the highway?

A. The one next to the shoulder. [58]

Q. Was there anything there that would cause the Mercury to swerve out to the center of the street?

A. Well, there was a Ford standing opposite there, but I didn't notice whether it was there or whether they stopped after the accident or before; it was setting right across from the wreck.

Q. What part of the highway did it occupy?

A. It was over on the shoulder.

The Coroner: That is all."

Mr. Stanbury: That is the end of that examina-

tion. Now, in regard to the pleadings in this case as constituting an admission that the plaintiff in this case has been damaged in the sum of \$6,150 as a result of this accident?

Mr. Murphy: We raise no issue on that amount.
(Discussion.)

Mr. Murphy: In any event we stipulate that that money was paid.

The Court: As a result of the injury or death flowing from this accident?

Mr. Murphy: Yes, that is so stipulated.

Mr. Stanbury: I have been given leave by the defendant to cross examine the defendant when she comes here, as a part of this case.

Mr. Murphy: She will be here.

Mr. Stanbury: With that reservation the plaintiff rests.

The Court: Under the new Rules of Federal Procedure we [59] have a section corresponding to Section 2055 of the Civil Code.

Mr. Stanbury: I was going to call Mrs. Hoyt. She will be here in a few minutes, and I am going to rest on that, counsel.

Mr. Murphy: On behalf of the defendants I would like to read into the record the testimony of Mrs. Hastings, an absent witness, now in New York, the testimony being from the transcript of the coroner's inquest.

The Court: Is that a sister?

Mr. Murphy: No, your Honor, a witness to the accident, who is now in New York.

“FLORENCE HASTINGS,

being first duly sworn, testified as follows:

By the Coroner:

Q. State your name, please.

A. Florence Hastings.

Q. Your residence? A. 2635 Daisy.

Q. Long Beach? A. Yes, sir.

Q. Housewife? A. Yes, sir.

Q. Where were you at the time this accident occurred, please? [60]

A. I was about two tenths of a mile behind the Packard.

Q. Which direction were you traveling?

A. I was traveling west.

Q. State what you saw in reference to the accident.

A. Well, I made the boulevard stop, that is, there is a signal at Santa Fe and State, and I made the stop on Santa Fe, to turn onto State Street, and when I made my stop, the Packard went through the signal, the signal was go going on State, and, of course, I then turned behind him and went right on, I was going to the Texaco Oil Company.

Q. All right, state what you saw in reference to the accident.

A. Well, as I was back about two tenths of a mile, right where the tracks cross State, the Packard went to pass another car, and he was over close to the double line in the street, and

(Testimony of Florence Hastings.)

there is a curve, and as he went around the curve, the Mercury was coming from the opposite direction, and they went together, and I never stopped, I went on. I went behind the Packard and on to the refinery.

Q. Could you tell where the impact occurred in reference to the center line of the highway?

A. Well, the way it looked to me, he was on the wrong side of the street.

Q. Could you tell how far over the center line of the street he was?

A. Well, it looked like he was astraddle of the two [61] lines, the center.

Q. Do you know what caused the Mercury to come from the south side over to the center of the street?

A. No, I don't. The Mercury, it happened, of course, so suddenly, I was driving along and the next thing they were together.

Q. Could you tell in what manner they struck, that is, what part of the Mercury struck the Packard, or what part of the Packard struck the Mercury?

A. The front.

Q. How fast was the Packard traveling?

A. Well, I would say forty-five or fifty miles an hour.

Q. And could you form any opinion as to the speed of the Mercury?

A. No, I could not.

Q. Well, the officer testified that there was

(Testimony of Florence Hastings.)

forty-eight feet of skid marks made by the Mercury coming from the south part of the street over to the center. Do you know how far the Mercury pursued that course?

A. No, I don't.

Q. Was either party thrown out of their cars? A. Yes, the lady.

Q. Was the traffic light or heavy at the time?

A. It was very light at the time.

Q. Was the Mercury passing another car at the time, do you know? [62]

A. Not that I could see.

Q. Well, the car that the Packard was passing, what part of the highway did that car occupy?

A. Well, he was, I guess you would say in the second lane.

Q. Next to the center line?

A. No, next to the shoulder.

Q. Well, was it necessary for the Packard to straddle the center line in order to pass that car? A. No, I would not think so.

The Coroner: All right, any questions? (No response). That is all."

Mr. Murphy: However, this witness was later recalled:

“FLORENCE HASTINGS,

being recalled, testified as follows:

By the Coroner:

Q. When you saw this accident, did you realize that it was a pretty bad wreck?

A. Yes, sir.

Q. How did it happen you didn't stop?

A. Well, I saw the lady—when I saw the two sailors getting out of their car and going to the wreck and there were other cars stopping and I was on my way after my husband, and he is always irritable if I am late, and so I went on.

Q. And who did you tell that you had witnessed an [63] accident?

A. My husband.

Q. Did you tell the police?

A. No; there was no police there at the time.

Q. Well, do you know how it happened that the first the police learned that you had seen the accident was through Mr. Hoyt?

A. Well, no, I would not say it was, because I think my husband—they called from the Texaco for the ambulance, and I think there is where they found out that I saw it.

Q. Are you acquainted with Mr. Hoyt?

A. No, sir.

Q. By Mr. Hunt: Did you stop at all at the scene of the accident?

(Testimony of Florence Hastings.)

A. I went just as slow as I could go without stopping, because I had to get around behind the Packard, and I saw other cars were stopped, and I didn't stop, and the lady, as we came back, they were putting a blanket or something under the lady's head.

Q. Did you get out of the car and come back?

A. No, I picked him up at the refinery, and we turned around and came right back.

Q. Did you stop then?

A. No, we didn't stop, there were several cars stopped and they seemed to be doing all right, and I didn't stop.

Q. You didn't take note of the physical facts such as [64] marks on the pavement at any time?

A. Yes, I drive over there every day, and the marks were there for several days, of oil and grease.

Q. You saw some marks on the other side of the double center line? A. Yes.

Q. By Mr. Boone: Did you see oil marks north of the center line the following day?

A. Yes.

Q. And didn't you notice considerable marks on the pavement where the ambulance and cars had driven through that oil? A. Yes.

Q. Those were the marks you saw north of the center line? A. Yes.

(Testimony of Florence Hastings.)

Q. And when you were driving back, I think you stated you saw a car as you started to pass the Packard? A. Yes.

Q. Did you see that car?

A. Well, it was parked along the curb.

Q. On which side of the highway?

A. On the right headed west.

Q. About how far from where the two cars were standing?

A. Well, it was almost even with the cars, a little bit of forward, I would say. [65]

Q. Did you see anybody getting out of that car, see a man getting out of that car?

A. Yes, there was a man that was rushing down toward the gate at the refinery; later, I heard he was the one that was going to make a telephone call.

Q. And did you see those two boys that testified here?

A. Yes, I saw them; they were on the opposite side.

Q. By a Juror: Was this car that was parked on the highway on the shoulder?

A. It was on the shoulder.

Q. By Mr. Hunt: And was west or east of the point of impact?

A. I would say it was west.

Q. Beyond where the point of impact occurred? A. Yes, just a little.

Q. And which way was it headed?

(Testimony of Florence Hastings.)

A. It was headed west.

Q. Headed away from the accident?

A. Yes.

Q. And no part was on the highway?

A. No, it was clear at the curb.

Q. Did you see any car on the dirt highway, at the side of the highway?

A. Yes, these boys were stopping and another car.

Q. What boys?

A. Well, these sailors. [66]

Q. After the accident, you mean?

A. Yes.

Q. By Mr. Boone: May I ask you about knowing Mr. or Mrs. Hoyt, did you ever see or hear of them until you came here and saw Mr. Hoyt?

A. No, I never have.

Q. The first time you ever saw him or heard of him?

A. That is the first.

Q. By a Juror: You saw a man get out of this parked car and run to the refinery, he had been standing there or——

A. No, I think he stopped; I understood he rushed to go to call the ambulance, because the lady was hanging out of the car, and I saw her and the other cars were stopping, and as I say, I didn't stop.

Q. Did you notice him driving ahead of you as you drove along and pull over to the side, or had he been parked there?

(Testimony of Florence Hastings.)

A. Apparently he was right ahead of the Packard and pulled to the side and stopped at the accident.

Q. By Mr. Coleman: Do you know who the man was that called the ambulance, that went into the Texaco Company?

A. Well, no, he is a man that is employed there.

Q. Do you suppose your husband could find out who that man was?

A. I suppose he could, yes.

Q. Did he witness the accident?

A. I don't think he did, he just heard the impact and [67] rushed over where he was working.

Q. By a Juror: You say you saw a man going down beyond this parked car towards the gate house?

A. Yes, he was running so I understood to call.

Q. It was a man who was employed at the Texaco Company?

A. Yes, I never saw anyone at all in the Packard when I went by; all I saw was this lady hanging out of the car.

Q. By the Coroner: When the Packard attempted to pass the car on the highway, how far was that from where the collision occurred?

A. Well, I would not know just how to say it; doesn't look like it was more than half a block, or maybe less.

(Testimony of Florence Hastings.)

The Coroner: Any other questions? (No response). That is all. Any other witnesses present? (No response).'' [68]

LILLIAN M. HOYT,

one of the defendants, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Lillian M. Hoyt.

Direct Examination

Q. By Mr. Boone: Your name is Lillian M. Hoyt? A. Yes.

Q. Where do you live, Mrs. Hoyt?

A. At the present time I am living down at Hermosa Beach.

Q. Where did you live on or about the 13th day of May, 1940? A. Rolling Hills.

Q. Do you have any recollection at this time of any incidents occurring on that date?

A. No, sir.

Q. Did you know at that time that you were involved in an automobile accident, about that time?

A. Yes.

Q. Do you recall at the present time where you had been, or what you were doing prior to the time that the accident occurred? A. No, I do not.

Q. Do you have any recollection at this time

(Testimony of Lillian M. Hoyt.)

of any [69] incident, or anything that occurred, or anything that you did for several days, or any definite period of time, prior to the accident itself?

A. No, sir.

Q. Subsequent to the accident what is the first recollection, or conscious recollection, that you have of anything, in so far as you are personally concerned?

The Court: May I project a question here to fix the time: Have you any recollection of what you did at all during that day, at any time?

A. No, I don't remember that day at all.

Q. You don't remember the day at all?

A. No.

Q. You don't remember getting into the automobile at all? A. No.

The Court: All right. I just thought that perhaps you remembered up to a certain point what you did that day.

A. I don't remember the day at all.

Q. By the Court: Do you remember the day before?

A. Right now I can't. Whether I did or not at the time I don't know.

Q. But the entire time has been blotted out, is that the idea? A. Yes.

Q. By Mr. Boone: Mrs. Hoyt, subsequent to the accident, the question was, what is the first conscious recollection [70] you have of anything, in so far as you are concerned?

(Testimony of Lillian M. Hoyt.)

A. Before or after the accident?

Q. After the accident.

A. I remember seeing my sister in the hospital; I very faintly remember that.

Q. Do you have any recollection at all, or any way of fixing how long it was after the accident occurred that you recall seeing your sister in the hospital? A. No.

Q. Do you recall at this time what date it was that you saw your sister at the hospital?

A. No.

Q. What do you recall concerning that circumstance? Will you explain in your own words the best you can what you recall concerning that?

A. Do you mean seeing my sister?

Q. Yes.

A. I can just faintly remember seeing my sister, and her son, standing by my bed; that is all I can remember.

Q. What is the next thing you can recall following the accident, that you have any clear recollection of? A. I don't know.

Q. I am not referring to that particular day, but I mean subsequent to that date, and when you were in the hospital.

A. I really don't know. I remember having some visitors. [71]

Q. When was the first time you became aware of your condition, subsequent to the accident?

(Testimony of Lillian M. Hoyt.)

A. I don't remember that either, unless it was when I first saw my sister.

Q. Was it while you were in the hospital?

A. Yes.

Q. Do you know how many days you were in the hospital? A. No.

Q. Will you describe to the court the best you can your own condition as you recall it, when you first became aware of it, after you became conscious? A. I hurt all over.

Q. Be a little more specific, if you can, please, Mrs. Hoyt.

A. I had a terrific headache; my head was hurting, and my knees were hurting.

Q. How long did that condition last?

A. I still hurt after I left the hospital.

Q. Were you having any headaches at that time?

A. Yes; always.

Q. You say "always". What do you mean by that?

A. They gave me an aspirin or two every hour or two; every time the headache started coming back they would give me an aspirin.

Q. Prior to this accident, had you been afflicted with headaches? [72] A. No.

Q. Constant headache? A. No.

Q. Had you had any physical trouble of any kind, or been under a doctor's care, prior to this accident? A. No.

Q. During the time that you were in the hos-

(Testimony of Lillian M. Hoyt.)

pital did you have any pain of any kind, other than headache?

A. As I said, my knees hurt, and my jaw and nose.

Q. Describe the sensation with reference to your jaw.

A. That was some time ago. I know it was out of shape; it was crooked, and it hurt on this side.

Q. Was that an ache? What I am trying to get at is, how did it feel? Describe it as best you can.

A. I don't know how to describe it; it just hurt. It wasn't exactly an ache.

Q. Did it hurt continuously?

A. It hurt continuously.

Q. Over what period of time, say, with reference to the time you were in the hospital?

A. I couldn't be exact.

Q. Approximate it. A. About a month.

The Court: You have a distinct recollection of the time you left the hospital, haven't you?

A. Oh, yes. [73]

Q. By Mr. Boone: During the time that you were in the hospital, Mrs. Hoyt, did you have any difficulty with your teeth?

A. I had one broken off that I had to have a cap put on.

Q. Was that work done at the hospital?

A. Yes.

Q. Which tooth? Can you describe it—point it out?

(Testimony of Lillian M. Hoyt.)

A. I can point it out. I can't describe it. It was on the left side.

The Court: What is called the eyetooth?

Mr. Boone: I don't know the name of the tooth.

Q. Prior to the accident had you had any difficulty with that tooth? A. No, sir.

Q. Was there any other work besides putting the cap on the tooth, when you were at the hospital?

A. Not while I was at the hospital.

Q. Did you have any lacerations on your head or any portion of your head?

A. Do you mean the scar here?

Q. Yes.

The Court: Cuts or tears, laceration means.

A. I had a cut on my head, and one on my chin and on my nose. I had stitches taken inside my nose.

Q. By Mr. Boone: Do you recall that being done yourself? A. No. [74]

Q. You have no recollection of that?

A. No.

Q. With reference to the cut, will you point it out? You had no marks of any kind, prior to this accident, in the general region of that cut, or scar—no scars of any kind? A. No, sir.

Q. During the time you were in the hospital what was done to you with reference to caring for that wound? A. What was done?

Q. Yes, if you recall.

A. I don't recall anything but stitches being taken out.

(Testimony of Lillian M. Hoyt.)

Q. During that time did you suffer any pain from that cut?

A. Well, it was all in that area. No, it was just all over.

Q. Will you indicate to the court where the pain or soreness was during that period of time—what portion of your head?

A. My whole forehead, and down underneath my eyebrows.

Q. You say you have a definite recollection of leaving the hospital?

A. Yes, I remember leaving the hospital.

Q. Did you return home? A. Yes.

Q. After you returned home what was the situation with reference to being up and about, and taking care of your [75] household duties?

A. I did not do anything. I would get up almost every day, and lie on the davenport. I wouldn't dress.

Q. Over what period of time, from the time you left the hospital, did this situation occur? About how long would you say?

A. Do you mean that I didn't dress, or do anything?

Q. Yes. A. About a month, I would say.

Q. During the time you were in the hospital, and during this month afterward that you described, what was the situation with reference to being nervous? Will you describe to the court how you felt in that connection, as best you can?

(Testimony of Lillian M. Hoyt.)

A. I don't know how to describe the nervousness. It seems like I would just fight constantly to keep from going to pieces; to be normal.

Q. Did you have any such difficulty as that prior to this accident? A. No, sir.

Q. How long did that situation continue with reference to your nerves, or does it still continue?

A. It still continues.

Q. Can you see any improvement, or feel any improvement in that connection?

A. No, I think it is getting worse.

Q. Have you had any difficulty with your eyes at all [76] subsequent to the accident?

A. They ache quite a bit. I don't think the eyesight is impaired.

Q. In other words, you can see just as well as you could before the accident, but your eyes ache, is that it? A. Yes.

Q. Has that situation continued from the time of the accident up to the present time?

A. Yes.

Q. Has there been any improvement in that situation?

A. No, I don't believe so. I have to wear dark glasses constantly.

Q. Had you worn glasses prior to the accident?

A. For reading I had worn glasses, yes.

Q. You have children, do you not?

A. Yes, sir.

Q. How many children? A. Three.

(Testimony of Lillian M. Hoyt.)

Mr. Stanbury: That is immaterial.

Mr. Murphy: Only in connection with the work involved in the house, if your Honor please.

The Court: There is a cause of action on the cross complaint. I think that may bear upon the cross complaint—the second cause of action, with the husband. It couldn't bear upon her, because she is merely asking general damages, and therefore the inability to care for the children, that [77] would bear only on the husband's cause of action. Let me look at the second cause of action.

Mr. Stanbury: I withdraw the objection.

The Court: Yes, there is an allegation in paragraph VIII.

Mr. Stanbury: Yes, your Honor.

The Court: Evidently it is made on the basis for expenditures of money. I will overrule the objection.

Q. By Mr. Boone: Do you recall the question?

A. I have three children.

Q. What are their ages?

A. 13, 18 and 20.

Q. Were the three children living at home?

A. Yes, sir.

Q. At the time this happened?

A. Yes, sir.

Q. Subsequent to the accident, and after you returned home, what was the situation with regard to taking care of the home, the children, getting

(Testimony of Lillian M. Hoyt.)

meals, and so forth? Were you able to do that or not?

A. No, we had to hire someone to come in and do that.

Q. Over what period of time, Mrs. Hoyt?

A. I think she was there about three months.

Q. Prior to the accident you had engaged in various activities, such as bowling, and so forth?

A. Yes. [78]

Q. Since the accident have you been able to do things of that nature?

A. No, I have tried, but I can't.

Q. During the time that you were in the hospital who was your doctor? A. Dr. Horst.

Q. Did he continue as your physician after you left the hospital?

A. No, he turned me over to my regular doctor.

Q. Who is your regular doctor?

A. Dr. Wilkie.

Q. Have you taken any treatments, or anything, from Dr. Wilkie since that date, or have you seen him?

A. He removed a couple of spots that came over the scar.

Q. How long after you left the hospital did that take place?

A. They started coming, I guess, a month or so. I had one taken off a couple of months after, and a couple of months later, I had another one taken off.

(Testimony of Lillian M. Hoyt.)

Q. Where was that work done, Mrs. Hoyt, at your home, the hospital, or where?

A. In his office.

Q. Where is his office located?

A. Hermosa Beach.

Q. Can you describe to the court what was done in that connection—what he did to you? [79]

A. He just removed the growth that was growing on the scar.

Q. Were you given an anaesthetic at that time? In other words, did that cause you any pain or suffering from that?

A. Well, it hurt, but not much.

Q. How long did that hurt, as you have described it, continue after the work was done?

A. Oh, no time at all.

Q. Was anything else done by your doctor with reference to your condition generally,—any other treatments?

A. No, sir. He called on me two or three times, but not other than that.

Q. At home? A. Yes.

Q. Referring back again to the tooth which you testified you had a cap put on at the hospital, have you had any work done on that tooth since you left the hospital? A. I had it extracted.

Q. Approximately how long ago would you say?

A. About three or four or six months ago.

Q. Do you recall the name of the dentist who handled that work? A. Dr. Tholand.

(Testimony of Lillian M. Hoyt.)

Q. Will you describe to the court what happened in that connection; that is, did they remove the entire tooth at one [80] time, or did it require more than one occasion?

A. No, the first time they left the root, and had to lance the gums to take the root out.

Q. I don't understand from that reply whether that was done at one time or on two different occasions.

A. Two different occasions.

Q. The same dentist on both occasions?

A. No.

Q. On the second occasion, when he had to lance the gum and remove the root, what dentist handled that operation?

A. Dr. Tholand.

Q. Did that cause you any pain or suffering?

A. I had an anaesthetic.

Q. Did it cause you any pain after the work was done, and after the anaesthetic was worn off?

A. No, because they kept me under hypodermics several days.

Q. What effect did these treatments on the scar and on the tooth, and so forth, have on your nerves?

A. Well, I'm terribly nervous. I guess it must have affected them.

Q. What effect, Mrs. Hoyt, has the scar which you have, had upon you when you are in the presence of other people, or out in public?

A. I am very conscious of it when I meet other people; it embarrasses me. [81]

(Testimony of Lillian M. Hoyt.)

Q. It causes you embarrassment?

A. Yes.

Q. With reference to headaches—I am not sure whether we covered this or not—are you still having those headaches?

A. I have headaches; my head hurts constantly. I don't know what kind of a hurt you would call it, but I have headaches practically every day; my head hurts constantly.

Q. Are you taking any treatments?

A. The doctor said there is nothing I can do for it.

Q. Is there anything you are taking for it at all? A. Other than aspirin.

Q. That situation did not exist prior to the accident? A. No.

Q. That is all.

Cross Examination

Q. By Mr. Stanbury: Mrs. Hoyt, you have had an operation this year for something disconnected with the accident, have you not? A. Yes.

Q. Were you in the hospital at that time?

A. The same time I had the roots removed from my gum.

Q. That was a rectal operation, was it not?

A. Yes.

Q. How long were you in the hospital at the time that [82] operation was performed?

A. About two weeks.

(Testimony of Lillian M. Hoyt.)

Q. When was that?

A. I don't remember the date.

Q. Do you remember what year it was?

A. '41.

Q. This year? A. I think so.

Q. You did not attribute that rectal operation to the accident, did you? A. No.

Q. You wore glasses before the accident, did you not? A. Yes.

Q. When you read? A. Yes.

Q. You do now? A. Yes.

Q. Your weight at the time of the accident was approximately 130 pounds, was it not?

A. Yes.

Q. That is your weight now, isn't it?

A. Yes.

Q. So far as you know, you didn't lose any weight—at least, you have no knowledge of having lost any weight during this experience?

A. No, sir. [83]

Q. The bandages had been taken off the cut upon your face by the time you went home from the hospital, had they not? A. Yes.

Q. When you went home were you confined to your bed at all, all day, any day?

A. I don't believe so. I don't remember any time.

Q. During your convalescent period you were up and down for a time, is that it?

A. Yes, sir.

(Testimony of Lillian M. Hoyt.)

Q. And since your accident—your husband is the proprietor of a heater business, I believe, is he not?

Mr. Boone: I object to that as immaterial.

Mr. Stanbury: That is preliminary, your Honor.

Q. You have worked at your husband's office since this accident, have you not?

A. Yes, I have.

Q. That is the business of which your husband is the proprietor? A. Yes.

Q. Are you still doing that?

A. I have started going back again. I have to do something to keep my mind occupied.

Q. By the Court: You did that prior to the accident, did you not? A. No, sir. [84]

Q. What kind of work do you do there?

A. I answer the telephone and file.

Q. What they call a receptionist?

A. You might call it that. I am on the switch-board.

Q. You just answer the phone? A. Yes.

Q. By Mr. Stanbury: Mrs. Hoyt, the mode by which you proceed in working is that you go to the office when your husband goes, isn't it?

A. That's right.

Q. And when he leaves you leave?

A. That's right.

Q. If he doesn't work or go to the office, or is gone a day, you don't go? A. No.

Q. But if he goes you do go?

(Testimony of Lillian M. Hoyt.)

A. Yes.

Q. You stay as long as he stays? A. Yes.

Q. And most of the time while you are there you run the switchboard, do you not?

A. Yes.

Q. That is a telephone switchboard?

A. Yes.

Q. What other type of work do you do?

The Court: What variety of switchboard is that, one or [85] two lines?

Q. By Mr. Stanbury: How many phones are there on that board? A. Six lines, I think.

Q. Do you know what kind of a switchboard that is? A. A PBX.

Q. One of those where you plug a little instrument at the end of a wire into a socket on the board? A. Yes.

Q. What you do, when a phone call comes in from the outside, you plug it in to the proper party called on the inside? A. That's right.

Q. You also are the person who gets outside calls for persons inside the organization?

A. That's right.

Q. What other work do you do while you are down at the office besides run the switchboard?

A. I do some typing and filing.

Q. Do you look after firm orders? A. No.

Q. You wore glasses before the accident? I think I asked you that.

A. For reading, yes.

(Testimony of Lillian M. Hoyt.)

Mr. Stanbury: I would like to recall Mrs. Hoyt later concerning the accident, after the other lady's testimony [86] is in. That is all at this time.

Redirect Examination

Q. By Mr. Boone: Mrs. Hoyt, have you had any change in your glasses since the accident?

A. Yes, I have.

Q. What was done in that connection?

A. One lens was changed. I don't know what.

Q. Who handled that work for you?

A. Dr. Smith.

Q. Dr. Alden Smith?

A. Dr. Alden Smith.

Q. In connection with the working at your husband's office, I think you stated you had never done any work of that kind at your husband's office prior to the accident?

A. I did, about eight years ago. I worked five months for him.

Q. Will you state to the court why you have gone to the office with him on occasions?

Mr. Stanbury: That is objected to as calling for the conclusion of the witness, and being immaterial to any issue in the case.

The Court: The only materiality of this is to show her ability to go about and perform things, as bearing upon whether there was any permanent disability that is likely to continue. Why she did it I don't think is material. [87] Some wives like

(Testimony of Lillian M. Hoyt.)

to work when their children grow up; they don't have enough other interests.

Mr. Murphy: That is true. The only point I had in mind was in connection with her condition being the reason for it.

The Court: I would not take her answer to that. That would have to be the subject of testimony. Mentally there is nothing wrong with her, according to the doctors who have testified so far.

Q. By Mr. Stanbury: You did have household help before the accident, did you not?

A. Yes, sir.

Mr. Stanbury: That is all.

Mr. Boone: By the way, Mrs. Hoyt, is there any further dental work necessary to be done?

Mr. Stanbury: I object to that as hearsay.

The Court: It would be what the doctor told her, and that would be hearsay. What is done she could testify to.

Mr. Boone: What I have in mind is whether or not it will be necessary to have a new tooth put in, or anything of that kind.

Mr. Stanbury: I don't object to that question.

The Court: She said she had the tooth extracted.

Mr. Boone: That is correct.

The Court: Have you replaced it with a bridge?

A. It has to be replaced with a bridge, and a cap put on the tip.

Mr. Boone: That will be all. [88]

GLADYS STEWART,

a witness called by and on behalf of the defendants, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Mrs. Gladys Stewart.

Direct Examination

Q. By Mr. Boone: Where do you live, Mrs. Stewart? A. Long Beach.

Q. Mrs. Hoyt, who was just on the witness stand, is she a relative of yours?

A. Yes, she is.

Q. What relation?

A. She is my sister-in-law.

Q. Did you have occasion to see Mrs. Hoyt on or about the 13th day of May, 1940, the day the accident occurred? A. Yes, I did.

Q. When did you first see her on that day?

A. At the bowling alley, at 10 o'clock in the morning.

Q. Where was the bowling alley located?

A. On Anaheim; I don't know the name of the bowling alley; I guess Anaheim Bowling Alley, just the other side of Pine.

Q. In Long Beach? A. In Long Beach.

Q. What did you do during the morning?

A. We bowled. [89]

Q. Over what period of time?

A. From 10 until about 12; then had our lunch.

Q. During that period of time from 10 to 12, did either you or Mrs. Hoyt have anything to drink?

(Testimony of Gladys Stewart.)

A. Mrs. Hoyt had a bottle of beer.

Q. That was while you were bowling?

A. Yes. I don't know what time; between 10 and 12. I had a Coca-Cola.

Q. During the noon hour did you have lunch?

A. Yes.

Q. Your lunch was at the bowling alley?

A. Yes; that is where we always ate lunch, right at the bowling alley.

Q. Do you recall what Mrs. Hoyt had for lunch?

A. It seems to me that day she ordered a special salad, a sandwich and a cup of coffee.

Q. Did she have anything else to drink during lunch? A. No.

Q. About how long did it take to eat the lunch?

A. I don't know; I imagine about a half an hour or 45 minutes.

Q. After you had lunch, what did you do then?

A. Went back and bowled again.

The Court: Were you on a team, or what?

A. No, we were trying to get into one.

The Court: Did you bowl regularly, every so often? [90]

A. We were bowling about three days a week then.

Q. By Mr. Boone: After you had lunch you say you started back bowling. Did you or Mrs. Hoyt have anything to drink during the afternoon?

A. Mrs. Hoyt had another bottle of beer.

Q. About what time would you say that was, to the best of your recollection?

(Testimony of Gladys Stewart.)

A. I would think about 1:30, or a quarter to 2, maybe.

Q. Did you leave her in the afternoon at any time? A. Yes.

Q. About what time?

A. I left her at 2:30.

Q. What was she doing at the time you left her in the afternoon?

A. There was an open women's tournament that she wanted to get into, and wanted me to try; I was too tired; so she went to the other side of the alley and asked——

Mr. Stanbury: We object to what was said as hearsay.

The Court: Were you with her when she did that?

A. Yes, I was with her. She wanted me to play too, but I was too tired. I went over with her; they did not have any vacancies at that time, so we sat down and watched them bowl for a while. We went over about 2 o'clock and I left at 2:30, because I had other things to do.

Q. What was Mrs. Hoyt's condition when you left her? A. Fine. [91]

Q. Was there any evidence of drinking at all, or anything of that kind?

A. No; she wanted to bowl in the tournament.

Q. At the time you left her, what was she doing?

A. She was sitting watching the women bowl, right where I had been sitting with her.

(Testimony of Gladys Stewart.)

Q. The tournament was in progress then?

A. Yes.

Mr. Boone: That is all. Cross examine.

Cross Examination

Q. By Mr. Stanbury: Mrs. Stewart, do you know where this accident happened?

A. No, I don't know anything about the accident.

Q. You know approximately where it occurred, do you? A. Approximately, I do.

Q. You know where the Texas Company's plant is? A. Yes.

Q. So you know where it happened, at least?

A. I know where the Texas plant is, on that highway.

Q. Which way from that place was the home of Mrs. Hoyt at the time of this accident?

A. Which way from the accident was her home?

Q. Yes.

A. Wait a minute; let me see.

Q. Let me withdraw that. She lived at that time in [92] Rolling Hills, did she not?

A. Yes.

Q. Rolling Hills is a subdivision in the Palos Verdes Estate, is it not?

Mr. Boone: I object to that as being improper cross examination, your Honor.

The Court: This would not be proper cross examination. I think it is competent evidence, if you

(Testimony of Gladys Stewart.)

want to recall her. She did not testify to anything, except that she was with her and left her at 2:30.

Mr. Stanbury: I agree with the court. I will withdraw the question.

Q. Which way from the Texas Company's plant, near which this accident occurred, was the bowling alley where you last saw Mrs. Hoyt?

A. I think I am right if I say east.

Q. It's down at Long Beach?

A. Yes. I said it was off of Pine; I think just the other side of Pacific, on Anaheim Boulevard.

Q. When you last saw Mrs. Hoyt, you say it was about 2? A. 2:30.

Q. You have no knowledge of what she did after that time until the accident occurred?

A. No.

The Court: Has anybody fixed the exact hour of the accident? [93]

Mr. Stanbury: The police call was at 4:30.

The Court: Everybody admits it was still daylight. Was it March or May?

Mr. Stanbury: May, your Honor.

The Court: Then it would be daylight.

Mr. Stanbury: The accident, I assume, can be stipulated to have occurred somewhere between 4 and 4:30?

Mr. Boone: Yes.

Mr. Stanbury: The police call was at half past 4.

Mr. Boone: Some time between 4 and 4:30.

(Testimony of Gladys Stewart.)

Mr. Murphy: It was within that time.

Q. By Mr. Stanbury: You saw Mrs. Hoyt have two bottles of beer? A. Yes.

Mr. Stanbury: That is all. [94]

EZRA S. HOYT,

a witness called by and on behalf of the defendants,
being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Boone: What is your name?

A. Ezra S. Hoyt.

Q. Mr. Hoyt, you are one of the defendants, and the husband of Lillian M. Hoyt who was just on the witness stand? A. Yes, sir.

Q. Mr. Hoyt, do you recall the date of the accident, May 13, 1940? A. Yes, sir.

Q. When was the first time that you were aware that an accident had occurred?

A. 6:30 in the evening, when I arrived home.

Q. That was after you had arrived home?

A. Yes, sir.

Q. Where did you go from there?

A. I went over to the Seaside Hospital.

Q. The Seaside Hospital is located in Long Beach? A. Yes, sir.

Q. Were you admitted to the room where your wife was at that time? A. Yes.

(Testimony of Ezra S. Hoyt.)

Q. Just describe briefly her condition as you observed [95] it when you were in the room the evening of the accident.

A. She was pretty badly battered up, with a bandage over her face; her jaw hanging over to the side—her nose was pushed over to one side. She was unconscious at the time that I arrived there.

Q. How long did you stay with her that evening?

A. I had my children with me, because she hadn't come home to get dinner. The call came in, and they were waiting at the gate for me when I drove in, so I stayed about an hour, with the children out in the hall; then I took the children out, and got something to eat; then I went back over, and took the children home, and then I went back again down to the hospital, and stayed until about midnight, and then went back home again.

Q. During any of that period of time that evening, when you were at the hospital, was Mrs. Hoyt conscious at any time, or did she talk to you?

A. Not to my knowledge. I couldn't make any sense out of it at all.

Q. The following day, the 14th, did you spend any time at the hospital that day?

A. I spent all day that day.

Q. During that day did Mrs. Hoyt talk to you coherently in any respect? A. No, sir.

Q. When was the first time that you had any

(Testimony of Ezra S. Hoyt.)

coherent [96] conversation with Mrs. Hoyt subsequent to the accident?

A. I believe that evening, the evening of the 14th, she did recognize me, but we did not have any conversation; that is, it was impossible to hold any; and I believe it was the next day before she really realized who I was, and what it was all about. And I believe that was the day that her sister was there, and, frankly, I think she recognized her sister before she did me.

Q. Can you describe to the court briefly in your own words what her condition was, as you observed it, that is, with reference to whether or not she showed any indication of suffering, or anything of that kind?

A. Do you mean at the time of the accident?

Q. No, on that second day, when she regained consciousness, or at least recognized you.

A. Yes, she was suffering.

Q. State what you observed in that connection.

A. She was moaning and complaining of hurts. She was bruised in the knees, leg, chest; her nose was over on one side; the jaw was sagging; it was starting to get back into shape a little bit. She just kind of hurt all over.

Q. How many days was she in the hospital?

A. She left the hospital about May 28th.

Q. Did you receive or pay any bills from the hospital?

A. Yes, sir.

Q. What was the amount of that hospital bill?

(Testimony of Ezra S. Hoyt.)

A. Can I refer?

The Court: Yes.

A. I believe that hospital is mixed up with the hospital bill for the tooth extraction. Do you want them separate?

Mr. Boone: I only want the Seaside Hospital.

The Court: Yes, I think they should be separated.

A. Seaside Hospital, from 5-13 to 5-28, \$192.89; special nurses, Seaside Hospital, from 5-13 to 5-28, \$225.

Q. By Mr. Boone: Did you incur any indebtedness there for medicine, or anything of that kind?

A. Medicines were included in the Seaside Hospital bill. There was a \$4 bill from Dr. O. Jolson; the name I couldn't remember the other time; he was the man who put the little cap on the tooth to save the sharp points from cutting. There was just a little cap put over the tooth in the hospital, and he charged \$4 for that.

Q. Have you paid all those bills, Mr. Hoyt?

A. Yes, sir.

Q. Were there any other indebtedness which you incurred?

A. Dr. Horst.

Q. I mean, in connection with the hospital.

A. The hospital itself at that time?

Q. Yes.

A. No, that is all I have listed at that time. [98]

Q. Who was the doctor in charge of Mrs. Hoyt's

(Testimony of Ezra S. Hoyt.)

case during the time she was in the hospital, subsequent to that?

A. Dr. Horst took care of Mrs. Hoyt while she was in the hospital. When she was released from the hospital Dr. Wilkie took over.

Q. Dr. Horst, have you any statement or bill for his services?

A. He told me the amount, and I wrote him a check.

Q. What was that amount? A. \$150.

Q. You say that has been paid?

A. That has been paid.

The Court: Did you gentlemen figure out the total?

A. I have a \$5 ambulance bill that came in.

The Court: What is the total doctors' bills and hospital bills?

A. I haven't got them sub-totaled. I have got X-rays; I have got the total of the whole thing, including this special housekeeper.

The Court: Leave the housekeeper out.

A. This was a special housekeeper; not the regular housekeeper.

The Court: Not for the present.

A. \$813.27.

Mr. Boone: Let me see if I get that straight.

A. That includes Dr. Tholand's bill, too. [99]

The Court: Go ahead. I thought you had the total.

A. I haven't got the sub-total; just the complete total, your Honor.

(Testimony of Ezra S. Hoyt.)

Q. By Mr. Boone: You have testified that after Mrs. Hoyt left the hospital, another doctor took over the case. What was his name? A. Dr. Wilkie.

Q. How long has Dr. Wilkie been acting in the capacity of her physician?

A. Well, he has been for several years.

Q. He still is?

A. He is our family consulting doctor.

Q. Have you incurred any indebtedness, in so far as he is concerned?

A. There is a \$30 charge for a consultation with Dr. Horst, and after the time of the accident, then Dr. Wilkie, I imagine \$17 beyond that is all I have charged of what I paid Dr. Wilkie towards this amount. I have the total charge, \$47 chargeable to the accident from Dr. Wilkie.

Q. After Mrs. Hoyt had returned home what was her condition, as you observed it, with reference to her ability to take care of the home, children, and so forth?

A. It wasn't possible for her to do anything; she was nervous; she was weak; she was up and she was down, and her mind was in a pretty confused state, so she wasn't in any condition to take care of her home, or her children. [100]

Q. Over what period of time did that situation last from the date of the accident?

A. I didn't feel free to release Mrs. Hoyt for anything until about October.

Q. October of what year? A. 1940.

(Testimony of Ezra S. Hoyt.)

Q. During the period of time from the date she returned home from the hospital, until October, 1940, did you employ anyone in the house to take care of the household duties, and the children?

A. I did.

Q. Who did you employ?

A. Roberta Gallik.

Q. Did you have the same person during the entire period of time?

A. I had her from about—let's see; I would like to look back, and tell you the date she came to work; the 21st of May, until August 30th. That is, in addition to our household help.

Q. What did you pay her?

A. I paid her \$70 a month.

Q. What was the total amount you paid her?

A. \$233.50.

Q. After she left, until October, who did you have in the home?

A. May I explain that we always had a man at the place, [101] taking care of the outside, and his wife assisted with the housework, and during the period until August 30th we had Roberta Gallik in to take charge of the home and run it. Then after she left I took Mrs. Hoyt and my daughter and went east. When I came back I put my youngest daughter in a boarding school, and the home problem was solved.

Q. With reference to the dentist, you have re-

(Testimony of Ezra S. Hoyt.)

ferred to a dentist bill. You include in the Seaside Hospital bill the amount of \$4?

A. That's right.

Q. What dentist has Mrs. Hoyt consulted subsequent to the time she left the Seaside Hospital?

A. Following the Seaside Hospital, we called Dr. Fridel, our regular dentist.

Q. Were you present at that time?

A. Yes.

Q. Did you incur any bill, or receive any statement in connection with work he did?

A. Yes; he took X-rays.

Q. What was the amount of that bill?

A. \$5.

Q. Has that been paid? A. Yes.

Q. After Dr. Fridel had taken the X-rays, what was done?

A. He recommended us to Dr. Borland for the extraction, as the tooth was shattered. [102]

Q. Did you go to Dr. Borland then?

A. We did.

Q. Did you incur any obligation in connection with Dr. Borland's services?

A. No, because he didn't get the tooth out. He worked on her two hours; had us both in such a state that we decided to call it off, and I took her home; she was in pretty bad shape.

Q. He never rendered a bill, and you received no statement? A. No.

Q. Who did you go to then?

(Testimony of Ezra S. Hoyt.)

A. We then went to Dr. Tholand.

Q. Dr. Tholand has handled her case since that time?

A. He was the one who removed the tooth, yes.

Q. Have you had any bill for his services?

A. Yes.

Q. What is the amount of that?

A. He had new X-rays taken by Dr. Henry (?), \$5, which I paid; then his bill for operating on the tooth was \$50, which I have his receipt for.

Q. That has been paid also? A. Yes.

Q. In connection with Mrs. Hoyt's eyes, was anything done subsequent to her returning home after the accident, with reference to her eyes? [103]

Mr. Stanbury: That is objected to upon the ground that no foundation has been laid that it was necessary as a result of this accident.

The Court: She has testified that she had her glasses changed.

(Discussion.)

Mr. Boone: I waive the question, your Honor.

The Witness: I can't ask a question, can I?

The Court: No, you merely answer the questions.

Q. By Mr. Boone: You were the owner of the Mercury automobile? A. Yes, sir.

Q. Do you know what the value of that car was just prior to the accident?

A. Well, I figured the value in this way: The car cost me \$1,205, the retail price of the car—

(Testimony of Ezra S. Hoyt.)

Q. Just state if you do know what the value of the car was just prior to the accident.

The Court: What model was it?

A. 1939 Mercury, club sedan.

Mr. Stanbury: May I just check this complaint, your Honor?

The Court: It is alleged in the cross-complaint, paragraph VI that the damage was \$654.26. The only way to prove damages, if it was not a total loss, is to show the value before and after, and, ordinarily, the price of [104] repairing. That is the standard adopted by California, in that respect, and we adopt it here, because that is the only gauge we go by.

The Witness: Do you wish me to explain how I put that in?

The Court: No.

Q. By Mr. Boone: The question is, what was the value of your car just prior to the accident.

A. I figure \$904.26.

Q. What was the value of the car subsequent to the accident?

A. It sold for \$250 to the highest bidder, the Kelley Car.

Q. Leaving the car out, do you have a total of the amount of expenditures you have testified to here?

A. I haven't got them that way, because there are some I haven't testified to.

Mr. Boone: I assumed you had everything.

(Short recess.)

(Testimony of Ezra S. Hoyt.)

Q. By Mr. Boone: Now, Mr. Hoyt, with reference to the amount of bills which you have testified to, do you have the total amount? A. I have.

Q. What is the total? A. \$1,571.65.

The Court: That includes the doctor, house-keeper, [105] dentist, and everything?

A. Yes.

Q. Is that the amount prayed in the cross-complaint, or is it larger?

A. I believe it is a little larger, if your Honor please.

The Court: That is all right; it doesn't matter; you have to prove that anyway; this is special damage.

Cross Examination

Q. By Mr. Stanbury: Mr. Hoyt, when was it that you and your wife made the trip east?

A. October, 1940.

Q. How long were you gone on that trip?

A. About three or four weeks. About three weeks, I believe.

Q. That was a train trip?

A. A train trip to Detroit, and we got a car, and drove home.

Q. Was it after you came back from the east that Mrs. Hoyt resumed her work at your office?

A. Let us put it this way: It was after she came back from the east that she went to work at my office. She was not working in my office before we went east.

(Testimony of Ezra S. Hoyt.)

Q. She said she had worked there eight years before.

A. She hadn't worked for eight years. [106]

Q. What I meant by resuming work at your office was going back to work at your office.

A. She went to work in my office after we got back, in October.

Q. That was the first time after this accident that she had worked at your office? A. Yes.

Q. She has been doing that ever since, save when she was at the Good Samaritan Hospital in 1941?

A. Yes, except this summer; she hasn't worked this summer.

Q. She hasn't worked at all this summer?

A. No; she just came back again last Wednesday.

Q. By the way, what year model was that car?

A. It was purchased new May 18, 1939.

Q. So it was just a year old, less five days, at the time of the accident? A. That is correct.

Q. You got home for dinner that night you say about 6? A. 6:30.

Q. Half past 6? A. Half past 6.

Q. That was your usual time?

A. Yes, between 6 and 6:30.

Q. You came home expecting to have your dinner at home, did you not? [107] A. Yes.

Q. How far was the scene of this accident from the place where you folks were living at that time in Rolling Hills?

(Testimony of Ezra S. Hoyt.)

A. I would judge about five to six miles; maybe seven.

Mr. Stanbury: That is all.

Mr. Murphy: Your Honor, the defendants rest their case in chief.

Mr. Stanbury: I will recall Mrs. Hoyt, if your Honor please, as an adverse witness.

The Court: All right. [108]

REBUTTAL

LILLIAN M. HOYT,

recalled as a witness on behalf of the plaintiff, having previously been sworn, testified as follows:

Direct Examination

Q. By Mr. Stanbury: Mrs. Hoyt, do you recall from other visits there, the location of the bowling alley described by your sister-in-law upon the witness stand? A. I know it's on Anaheim.

Q. I mean, you remember that bowling alley from some time or other being there, do you not?

A. Yes.

Q. It's on Anaheim near Pine in Long Beach?

A. It seems to me I used to turn up Pacific to Anaheim, so it must be near Pacific.

Q. Near Pacific and Anaheim? That is east of where the accident occurred, assuming the accident occurred on Highway 101 near the Texas Company,

(Testimony of Lillian M. Hoyt.)

is it? A. I can't place the Texas Company.

Q. You have been by since to see where the accident happened, haven't you?

A. No, sir, I don't know where the accident was.

Q. Do you know where the oil tanks are?

A. I can picture them, but I wouldn't know where they were. I remember seeing them.

Q. At the time of this accident, and prior thereto, you [109] were doing the cooking at your home, weren't you? A. Yes.

Q. You were the one that prepared the evening meal for Mr. Hoyt, and for your children?

A. Yes, sir.

Q. So far as you know, you would have prepared dinner on the day of this accident, would you not?

A. Yes, sir.

Q. You would expect your husband home some time between 6 and 6:30? A. Yes.

Q. If, at the time of this accident, you were traveling east on Highway 101, at the Texas Company plant, near the outskirts of Long Beach, you would be traveling away from your home, would you not? A. If I were traveling east, yes.

Q. Do you have any knowledge whatsoever as to how you got over from Long Beach to some place west of where the accident happened, before the accident? A. No.

Q. Do you have any knowledge as to where you were going, or what you were doing driving away from your home some time between 4 and 4:30 that afternoon?

(Testimony of Lillian M. Hoyt.)

A. No.

Mr. Stanbury: I have no further questions.

Q. By the Court: Is that car your car, or did you own [110] more than one car? I mean, was that car for your personal use, or does your husband have a car, too? A. That was my car.

Q. That was your car? A. Yes.

Q. Were you driving it every day?

A. Yes.

Q. How long had you been driving a car?

A. About 18 years.

Q. You have absolutely no recollection at all?

A. None at all.

Q. You heard your sister testify, I presume, that you and she were bowling that morning?

A. Yes.

Q. And that she left you at 2:30?

A. Yes.

Q. Does that bring to mind any remembrance of bowling on that day? A. No, sir.

Q. You remember being interested in bowling—bowling prior to that time, don't you?

A. Yes.

Q. But you don't remember what you did at that time? A. No.

Q. Do you remember having luncheon with her, and doing anything with her, which you heard her describe on the [111] stand?

A. No, sir, I don't remember the day at all.

Q. Or your remaining for a tournament.

A. No.

(Testimony of Lillian M. Hoyt.)

Q. Or trying to get into a tournament, and being told that there was no opening? A. No, sir.

Q. The place where you were going has been described; you heard it described, and it is away from your home? A. Yes.

Q. Have you any memory relative to anybody living in that direction, that would have taken you there that way, refreshing your recollection as to where you might have been going? A. No.

Q. You have no idea why you were going away from home at 4 or 4:30 in the afternoon, rather than going back toward your home to prepare the evening meal for your children? A. No.

Q. By the way, your children were going to school at that time? A. Yes.

Q. That would be about the time they would get home, or earlier than that? What grades were they in?

A. The two older ones went to the Redondo Union High School, and would get home at 4:30 or 5 o'clock; the youngest [112] one was going to Chadwick, and she would get home at 4 or 4:30.

Q. At that time was it your custom—let us take an average day, when you went downtown bowling,—when would you leave to go towards your house to return home, in case you had no other errands to do?

A. I don't know, but I always planned on being home when my youngest daughter got home; I usually did.

(Testimony of Lillian M. Hoyt.)

Q. Around 4 o'clock?

A. Yes; we always had someone at the house, though.

Q. You wanted to be there when the children got there?

A. Yes, sir.

Q. That makes it more mysterious as to why you should be miles away from home at about the time when you were accustomed to being home. You can't help us at all, can you?

A. No.

Q. Have you any friends who live in that direction where the accident occurred?

A. No one other than Mrs. Chamberlain, the lady who just testified—my sister.

Mr. Boone: You mean Mrs. Stewart?

A. I mean Mrs. Stewart; I am sorry.

Q. By the Court: You don't remember going to her house that afternoon?

A. I don't remember. [113]

Q. You don't remember being with her?

A. No.

Q. Assuming you would spend the morning, from 10 o'clock until 2:30 with her, you wouldn't be likely to be going to her house?

A. I don't know.

Q. She did not intimate that she was expecting you?

A. You asked me if I knew anyone there. She was the only one I knew.

Q. I am trying to find out if anything you did in the past might be a clue, and why you were at

(Testimony of Lillian M. Hoyt.)

a point you were not supposed to be that time of the afternoon.

A. I am sorry; I just don't know.

The Court: All right.

Q. By Mr. Boone: Mrs. Hoyt, do you recall returning to the bowling alley for any purpose at all?

A. I don't know why I should.

Q. You don't remember any reason why you should go back at all? A. No.

Mr. Boone: That is all.

Q. By Mr. Stanbury: You never found anything missing that you had with you, afterward?

A. No.

Q. You never discovered that you had lost a coat or a purse or anything of that kind? [114]

A. No.

Q. Do you recall being at that bowling alley with your sister-in-law, Mrs. Stewart, on any other occasion before this accident? A. Yes.

Q. What do you remember as to whether it was your custom to partake of beer or other alcoholic beverages while you were bowling?

A. Not very often. I had.

Q. Did you seldom partake of beer before this accident, or was it a common occurrence?

A. Seldom.

Q. By that do you mean once a month or more often than that? A. Maybe less than that.

Q. Less than once a month? A. Yes.

(Testimony of Lillian M. Hoyt.)

Q. Of course, you have no knowledge whatsoever about any drinking you had done on that day?

A. No.

Mr. Stanbury: No further questions.

Q. By Mr. Boone: In your bowling, did you have your own bowling ball? A. Yes.

Mr. Stanbury: I object to that as immaterial.

Mr. Boone: I think it is quite material. She [115] may have been returning for it. It is preliminary.

The Court: Of course we don't know whether it was in the car or not.

Mr. Boone: That is right; it is purely preliminary. I have further evidence to follow this on this phase.

Q. Did you use the bowling balls that were there for public use, or did you have your own?

A. I had my own.

Mr. Boone: That is all.

Q. By Mr. Stanbury: Do you know whether you had the bowling ball at any time with you on the day of this accident?

A. I don't remember the day of this accident, but I would imagine I had it.

Q. When did you last see that bowling ball?

A. I couldn't tell you now.

Q. When you did bowl since the accident, did you use the same ball?

A. I don't use my ball now; it's too heavy. I am not strong enough.

(Testimony of Lillian M. Hoyt.)

Q. You still have it? A. I still have it.

Q. Have you any knowledge whatsoever of anybody having gone anywhere and gotten that ball after the accident? A. No.

Mr. Boone: You mean you have no knowledge of your own? A. No knowledge of my own, no.

[116]

Mr. Stanbury: That is all.

Mr. Boone: Mr. Hoyt, resume the stand. Mr. Stanbury, do you have any further witnesses you want to call?

Mr. Stanbury: No. [117]

SURREBUTTAL

EZRA S. HOYT,

recalled as a witness on behalf of the defendants in surrebuttal, having been previously sworn, testified further as follows:

Direct Examination

Q. By Mr. Boone: Mr. Hoyt, were you familiar with the bowling ball which your wife used in bowling?

A. Yes, sir, I bought it for her birthday, May 7, 1940, a week ahead of this accident.

Q. After the accident did you go to the car to examine if the bowling ball was in the car?

A. I did.

(Testimony of Ezra S. Hoyt.)

Q. Was that bowling ball in that car?

A. No; I couldn't find it. I asked the officers at the garage, the police garage, if they found it, and they said they hadn't seen it.

Q. Did you make any other or further effort to locate that bowling ball?

A. I found out that morning that the wife had been bowling with my sister, so I called my sister about it, and asked if she had the ball, and she said——

Mr. Stanbury: Just a moment, I object——

The Court: You can't testify to that. [118]

Q. By Mr. Boone: Of course, you can't give the conversation, but other than that, did you make any other effort to locate the ball? A. No.

Mr. Boone: That is all.

Mr. Stanbury: No questions. [119]

GLADYS STEWART,

recalled as a witness on behalf of the defendants in surrebuttal, having previously been sworn, testified further as follows:

Direct Examination

Q. By Mr. Boone: Mrs. Stewart, in your bowling with your sister-in-law were you familiar with the fact that she had her own bowling ball?

A. Yes.

(Testimony of Ezra S. Hoyt.)

Q. What type of ball was it?

A. I think it was a Brunswick. A rather nice one.

Q. A Brunswick?

A. I am not sure of that.

Q. Do you recall the color? A. Black.

Q. State whether or not there were any initials on it.

A. Yes, she had her initials on it.

Q. You had seen it many times, had you?

A. Yes.

Q. You left before she did, from the bowling alley? A. Yes, I left at 2:30.

Q. When was the next time you saw the bowling ball?

A. The next day. My brother called me up that night of the accident, and asked me if I had her bowling ball, and I said no, I did not have it; that maybe she left it at the [120] alley. So I went to the bowling alley the next day, and it was there.

Q. You went to the bowling alley? A. Yes.

Q. Her ball was there?

A. Yes, it was. She had it in a case.

Mr. Boone: That is all.

Cross Examination

Q. By Mr. Stanbury: Where was it in the alley, Mrs. Stewart, when you called for it?

A. They had it in this little booth where they sign you up for the different alleys.

Q. That is, behind the counter?

(Testimony of Gladys Stewart.)

A. Yes, I guess that is what you would call it.

Q. Mrs. Hoyt's initials were on the case, too?

A. No, just on the bowling ball.

Q. That was a new ball; she just had it a short time?

A. Yes.

Mr. Stanbury: That is all.

Q. By the Court: By the way, did you ask them whether she had stored the ball with them, or whether she had left it accidentally, and had not picked it up?

A. No, I just asked them if that bowling ball was there, and they said yes, and just handed it to me, and I went home. [121]

Q. You don't know whether she left it there to call for on the following day, without having to lug it around?

A. No.

Q. Or whether she left it accidentally, and they picked it up?

A. No.

Q. You called for the ball, and they gave it to you from behind the counter?

A. Yes.

The Court: All right. Anything further, gentlemen? We are trying to get as much light as we can. [122]

LILLIAN M. HOYT,

recalled as a witness on behalf of the defendants in surrebuttal, having previously been sworn, testified further as follows:

Direct Examination

Q. By Mr. Murphy: Mrs. Hoyt, I believe this ball was purchased about May 9th, and you had used the ball on more than one occasion from the time you first got it up to the day of the accident. About how many times had you used it?

A. I don't remember. I know I had used it.

Q. Mrs. Hoyt, in using that ball, do you recall whether you kept the ball at the bowling alley, that is, rented a locker or space or room, or some similar arrangement, or did you take it home with you and bring it to the bowling alley when you would go bowling?

A. I did not leave it at the bowling alley, because I planned on going out in the evening with Mr. Hoyt to another bowling alley.

Q. You were going to bowl that evening, too?

A. I don't know.

Q. I would like specifically to ask you if you remember from the time your husband purchased that ball for you, was it your habit in using it, to take it from that one bowling alley and take it from various bowling alleys to that one, on any occasion? [123]

A. Yes.

Mr. Murphy: That is all.

(Testimony of Lillian M. Hoyt.)

Cross Examination

Q. By Mr. Stanbury: Do you remember you had rather thought of going out with Mr. Hoyt to bowl that evening?

A. No, but I know he would want to go to Long Beach if we did go bowling.

Q. You had only had the ball four days, including the fraction of the day of the accident?

A. Yes.

Q. Where had you ever bowled with it before?

A. I don't remember bowling with it any place before.

Q. So you don't remember any occasion when you either used that ball, or brought it home with you and left it, from where you were bowling, do you?

A. Yes. I remember bringing the ball home.

Q. When do you remember bringing it home?

A. I don't know. I remember bringing it home.

Q. Do you mean from the bowling alley where you came from? A. From the bowling alley.

Q. I understood you to say a moment ago that you did not have any recollection as to having bowled the ball before.

A. Yes, I have a recollection; I don't know how many [124] times. It might have been just once.

Q. Where had you bowled with it before, if you remember some occasion?

A. With Mrs. Stewart.

(Testimony of Lillian M. Hoyt.)

Q. Where? A. At Long Beach.

Q. What alley?

A. The same one we were talking about.

Q. You do not have any recollection of having used your ball at any alley other than the one at which it was found by your sister-in-law after the accident, is that right?

A. I can't now—I can't remember of any time.

Mr. Stanbury: That is all.

Mr. Murphy: We rest, your Honor.

The Court: Anything further?

Mr. Stanbury: Plaintiff rests.

(Argument.)

[Endorsed]: Filed Dec. 18, 1941. [125]

[Endorsed]: No. 10058. United States Circuit Court of Appeals for the Ninth Circuit. Lillian M. Hoyt and Ezra S. Hoyt, Jr., Appellant, vs. Sears, Roebuck and Co., a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 20, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeal
for the Ninth Circuit

No. 10058

LILLIAN M. HOYT and EZRA S. HOYT, JR.,
Appellants,

vs.

SEARS, ROEBUCK AND COMPANY,
a corporation,

Appellee.

STATEMENT OF APPELLANTS' POINTS
ON APPEAL

Point I.

Under the rule announced in the case of Shamrock Oil and Gas Corporation vs. Sheets, 313 U. S. 100, the United States District Court had no jurisdiction to render any judgment in this cause and the judgment is void.

Point II.

The Appellee being a foreign corporation and having commenced this action as original plaintiff in the Superior Court of the State of California, in and for the County of Los Angeles, improperly removed the said suit to the District Court of the United States contrary to the removal statutes and any judgment rendered by the United States District Court was, under the circumstances, in excess of its jurisdiction and void and this Court should sua sponte, reverse the judgment and remove the

case to the Superior Court of the State of California, in and for the County of Los Angeles for further proceedings.

Point III.

The evidence is insufficient to support the Findings of Fact and Conclusions of Law and Judgment rendered in pursuance thereof.

Point IV.

The United States District Court erred in failing to give to appellant Lillian M. Hoyt the full benefit of the presumption that a person uses ordinary care for his own safety and concern.

The appellants respectfully designate the use in consideration of the foregoing points on appeal all of those pleadings, papers and records set forth in the Amended Designation of the papers, records, matters and evidence to be used on the record on appeal (Rule 75) heretofore served on counsel for Appellee and the original of which was filed with the Clerk of the United States District Court on January 26th, 1942.

KENNETH J. MURPHY

Attorney for Appellants

Received copy of the within this 19th day of Feb., 1942.

PARKER & STANBURY

Attorney for Appellee

[Endorsed]: Filed Feb. 21, 1942. Paul P. O'Brien, Clerk.

